89-1835 ①

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No. ________________

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1989

KELVIN H. KEITH,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PAN AMERICAN WORLD AIRWAYS, INC.,
CERTAIN CLAIMANTS, MORGAN D. KING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner

QUESTION PRESENTED FOR REVIEW

Whether a settlement agreement entered into between Respondents Pan American World Airways, Inc. ("Pan Am") and the Equal Employment Opportunity ("EEOC"), on behalf of Certain Claimants, arising out of an enforcement action brought against the former pursuant to the Age Discrimination in Employment Act violated due process, where no notice of the enforcement action was sent to, or received by, a large number of persons who were known by the EEOC to have been victims of Pan Am's purported discrimination and where the notice that was sent did not inform recipients that the EEOC's ADEA-enforcement action terminated the recipient's rights to bring an individual suit for relief under the ADEA.

PARTIES TO THE PROCEEDINGS BELOW

In addition to Petitioner and Respondents EEOC, Pan Am and Morgan D. King, the parties to the proceedings in the court whose judgment is sought to be reviewed in this petition include the following "CERTAIN CLAIMANTS":

Adams, C.S.
Albrechtsen, Frederick H.
Angleman, W.H.
Bacheler, William E.
Baer, Charles R.
Banning, Eugene R.
Bateman, John W.
Bay, William L.
Beebe, H., Jr.
Benson, Carl E.
Berg, David R.
Blackford, George L.
Blood, Sixton David
Brons, J.R.
Browne, Deaderick G.
Burchett, Gordon S.
Burn, John C.
Carpenter, A.W.
Chamberlin, W.R., Jr.
Christiansen, Norman C.
Colbert, Francis X.
Condy, R.J.
Cook, Wayne E.
Crance, Jerome
McColgin, Franklin H.
McFail, Harry
McLaughlin, Fred Joseph
McIntyre, Gould C.
McMurray, Robert
Mills, Merlin Hubert
Morey, Wesley G.
Murton, Edwin H.
Mulholland, Daniel B.
Musser, J.C.
Nelson, James C.
Nesbit, W.H.
Nittolo, Victor
Parsons, J.R.
Pearson, Raymond L.
Petty, Hebert G.
Pfahler, James J.
Pickering, Wilbur W.
Polson, Robert K.
Raabe, John L.
Reynolds, Robert P.
Roberts, Warren N.
Rogers, Darrell
Rooney, William J.

Davis, Joseph, Jr.
Diedrich, J.C.
Duffy, Francis X.
Dupre, A. Joseph
Egan, Ray J.
Fenimore, Richard B.
Fritz, Albert E.
Fuller, Melvin J.
Geler, J.J.
Gordon, Charles R.
Greely, Joseph U.
Green, J.C.
Hawkins, Charles T.
Herr, Edwin F., Jr.
Hillier, Arthur E.
Hirsh, Blake W.
Holt, George, Jr.
Hushing, Sumner K.
Hutchinson, Roy F.
Jordan, William R.
Karasek, Edward A.
Kean, W.R.
Knotts, Fred
Kowing, James E.
Landa, Fred.
Langhorne, W.K.
Larsen, Robert D.
Linari Frederick J.
Mayhew, Richard H.

Ross, Gerald B.
Rush, D.O.
Russell, Raymond L.
Schuhart, Thuel V.
Schreider, Elliott
Sceili, Joseph B.
Schimpf, Donald R.
Scott, John F.
Selleck, Z.E.
Shaffer, Edward
Shrum, Dwight L.
Sippel, Edwin A.
Smith, Charles A.
Snow, K.W.
Strickland, David W.
Taylor, Garrett E.
Thorell, Lennart
Tondorf, George F.
Trail, Clifford R.
Turner, Claude R.
Valla, Arthur P.
Vanderhoof, F.
Voges, Elvin H.
Walker, John A.
Voges, Elvin H.
Willard, Harlow E.
Willis, Richard W.
Wilson, A.S.
Wyland, Robert W.
Zahner, Clarence J.

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OPINIONS BELOW

Earlier opinions in this case preceding those giving rise to this Petition include two district court opinions in which prior proposed consent decrees were rejected. These are reported as follows: EEOC v. Pan American World Airways, Inc., 34 Fair Empl. Prac Cas. (BNA) 321 (N.D. Cal. 1984), later appeal, 622 F. Supp. 633 (N.D. Cal. 1985), appeal dismissed, 796 F.2d 314 (9th Cir. 1986), cert. denied, 479 U.S. 1030 (1987).

The district court decision which is the subject of this Petition is an order approving a settlement and consent decree, EEOC v. Pan American World Airways, Inc., No. C-81-3636RFP (N.D. Cal. June 17, 1988), which has not been reported. It is appended to this Petition as Appendix B.

The court of appeal's decision in this case, EEOC v. Pan American World Airways, Inc., Nos. 88-15672, 89-15192 (consolidated) (9th Cir., March 2, 1990), has been informally reported at 1990 Ninth Circuit slip opinions, page 2349 and has been designated for publication in the Federal Reporter, Second Series. It is appended to this Petition as Appendix A.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on March 2, 1990. This Petition for a Writ of Certiorari is filed within ninety (90) days therefrom, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 216(b) and (c) provides:

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

29 U.S.C. § 626(a)-(c) provides:

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title. Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

> **(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial**
>
> **(1)** Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.
>
> **(2)** In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in part:

> nor [shall any person] be deprived of life, liberty, or property, without due process of law;

(Bracketed matter supplied.)

STATEMENT OF THE CASE

This litigation began in 1981, when the Equal Employment Opportunity Commission ("EEOC") brought an enforcement action pursuant to 29 U.S.C. §§ 216(c) and 217 against Pan American World Airways, Inc. ("Pan Am"). The EEOC charged that the airline had violated 29 U.S.C. § 623(a), prohibiting age discrimination in employment, by requiring its pilots to retire at age 60, even if such pilots wished to continue being employed as flight engineers, a job with no maximum age limit. (App. A 12). Petitioner was among this large group of pilots forced into retirement by Pan Am. Id.

The EEOC's complaint against Pan Am sought relief on behalf of two named pilots and "any other persons who would have remained in the Company's employment in a Flight Engineer position but for the Company's refusal to employ that person after he reached the age of 60." Id. The case had a long and complex procedural history (App. B 69-71), including two district court opinions in which proposed consent decrees suggested by the EEOC and Pan Am were rejected. See, EEOC v. Pan American World Airways, Inc., 34 Fair Empl. Prac. Cas. (BNA) 321 (N.D. Cal. 1984), later appeal, 622 F. Supp. 633 (N.D. Cal. 1985), appeal dismissed, 796 F.2d 314 (9th Cir. 1986), cert. denied, 479 U.S. 1030 (1987).

Shortly after filing the complaint, the EEOC sought a list of former pilots from Pan Am, so that the EEOC could notify all pilots who qualified for inclusion in the suit. (App. A 13). Pan Am provided a list of 514 former pilots, but "inexplicably" only included addresses for 445 of these former pilots, id., so that sixty-nine of the former pilots on the Pan Am list were excluded from the EEOC's subsequent mailing list of a letter advising the addressees of the pending suit.

This two-paragraph, one-page letter, which is quoted in the court of appeal's decision, (see, App. A 13-15) requested that pilots eligible for being represented by the EEOC in the suit contact the EEOC in order to "ensure that . . . [they were] included in the EEOC's efforts to gain relief" and stated that if the EEOC did not "hear from" the addressee, the EEOC would "assume" that the former pilot was "not interested in continuing . . . [his] employment as a flight engineer with Pan

Am past the age of 60 and would "not contact . . . [him] further." (App. A 14) (bracketed matter supplied). The letter made no mention of what type of "relief" the EEOC suit sought, nor did the letter refer to the statutory authority under which the EEOC was proceeding, only stating that the EEOC was "currently suing Pan Am for age discrimination caused by its refusal to permit persons over the age of 60 to hold the position of flight engineer." Id. The EEOC letter also failed to mention whatsoever whether the suit against Pan Am "for age discrimination" might in any way affect the addressee's ability to bring an individual suit for age discrimination against Pan Am.

In addition to the sixty-nine pilots whose existence, but not address was made known to the EEOC via the list supplied by

Pan Am, at least six other pilots qualified to be represented by the EEOC never received the letter, but happened to learn of the suit in other ways. See, (App. A 15-16, n. 1). Thus, the EEOC did not send notice to almost 15% of the persons it knew would probably be eligible for representation in its suit, and later discovered that there were still other qualified pilots who found out about the suit only by happenstance. Only 93 of the 445 persons who were sent the EEOC letter (just over 21%) responded asking to be included in the suit. (App. A 15). The letter was not sent via registered or certified mail, so the EEOC never knew whether, or how many of, the remaining 352 letters actually reached their addressees.

After the previously mentioned proposed consent decrees between the EEOC and Pan Am were rejected, in 1987 the EEOC won a partial summary judgment, and trial commenced December 7 of that year. (App. A 24-25). Before closing arguments were made the EEOC and Pan Am submitted a third proposed settlement agreement and consent decree. This proposal provided for payment to 106 claimants, required that Pan Am allow current pilots who had not yet attained age sixty to become flight engineers when they became that age, and (most importantly to the instant case) dismissed the case not only with respect to the 106 pilots who had been represented by the EEOC, but also as to any other pilots who had been victims of Pan Am's forced retirement scheme. (App. A 25-26).

Petitioner, and seven other former Pan Am pilots not included in the 106 pilots covered by the proposed decree, then filed motions seeking inclusion in the settlement class, contending they had no notice of the suit until after the proposed settlement had been reached. (App. A 28). The district court held a hearing on the fairness of the proposed decree, but rejected the additional pilots' motions for inclusion, and approved the decree despite their exclusion from the suit. (App. A 29).

Petitioner and another of the excluded pilots appealed to the Ninth Circuit Court of Appeals. (App. A 30). After briefs had been filed, both appellants noted to the circuit court the existence of this Court's recent decision in Hoffman-LaRoche v. Sperling, ––– U.S. –––, 58 U.S.L.W. 4072 (December 11, 1989), which dealt with the notice to be provided in individual suits under another provision of the Age Discrimination in Employment Act ("ADEA"). (App. C 136-141). The circuit court of appeals held that the appellants could appeal the district court's ruling despite not having been parties throughout the lower stage of litigation (App. A 31), and found the appellants' arguments based on "fundamental . . . notions of due process" facially "appealing" (App. A 44-45). Nevertheless, the Ninth Circuit affirmed the district court's judgment in its entirety. (App. A 66).

The court of appeals held that the consent decree did not prejudice any existing rights of the appellant pilots' because their right to bring individual suits under the ADEA had already been lost, having been automatically cut off by the filing of the EEOC enforcement suit in

1981. (App. A 47). Therefore, the consent decree approved by the trial court was fundamentally fair despite its exclusion of the pilots omitted from it because the EEOC's notification procedures were deemed "sufficient to satisfy the requirements of due process." (App. A 52-53).

Petitioner timely filed this Petition for a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals.

REASONS FOR ALLOWING THE WRIT

Petitioner respectfully submits that the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and that the lower court has decided this federal question in a way that conflicts with applicable decisions of this Court. Specifically, in affirming the trial court's approval of a fundamentally unfair settlement and consent decree which purportedly bound a class of which Petitioner and scores of other pilots were members, without adequate notice that was reasonably calculated to apprise the class members of the EEOC's actions, the court of appeals has approved a deprivation of the pilots' statutory rights without compliance with the due process clause of the Fifth Amendment to the United States Constitution, as construed by this Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The Ninth Circuit's analysis of the instant case is also contrary to this Court's recent decisions in Hoffman-LaRoche v. Sperling, supra, and Martin v.

Wilks, —— U.S. ——, 109 S. Ct. 2180 (1989).

As the court of appeals' opinion notes, Congress in passing the ADEA set up a "complex statutory structure." (App. A 43). The goal of that structure is to restrict arbitrary discrimination in employment on account of age. (Id. at 34). Under the ADEA two types of "class actions" are provided for, and individual employees discriminated against may also sue. 29 U.S.C. § 626.

Individual suits are allowed pursuant to both 29 U.S.C. § 626(c)(1) and 29 U.S.C. § 626(b), in the latter provision's case via its incorporation in the ADEA of a provision of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). 29 U.S.C. § 216(b) also establishes that employees may bring suit not only on their own behalf, but on behalf of other similarly situated employees as well. This statutory representative suit is a "vehicle . . . wholly apart from Fed. R. Civ. P. 23" (App. A 36), the generally-applicable rule of civil procedure pursuant to which "class actions" may be instituted. 29 U.S.C. § 216(b) makes no reference to the type of notice that may be required to be given to absent class members. Such absent class members are only made party plaintiffs if they consent in writing to such status, and the consent is filed with the court (a process that has become known as "opting-in"). See, Spahn, Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act, 71 Geo. L.J. 119 (1982).

Enforcement actions may be brought by the EEOC on behalf of employees pursuant to the ADEA's incorporation of 29 U.S.C. § 216(c). Again, the ADEA and FLSA provisions incorporated therein do not make specific reference to, nor require, notice to absent members of the class of employees the EEOC may represent in such an enforcement action. Although employees must opt-in to such "subsection (c)" enforcement actions brought by the EEOC, the practical effects of failure to do so are strikingly different than in an employee representative suit, because institution of an EEOC enforcement action bars subsequent individual ADEA suits. 29 U.S.C. §§ 216(b), 216(c), 626(c).

Thus, although an absent class member is not "bound" in either case if he fails to opt-in to either type of ADEA/FLSA representative suit, his individual remedy remains if he fails to opt-in to an employee representative suit, but is extinguished by the institution of the EEOC enforcement action. Upon failure to opt-in to the latter type of representative suit, the victim of prohibited discrimination is left without a remedy.

The court of appeals recognized that over a half-dozen pilots known to satisfy the requirements of the class represented by the EEOC in the instant enforcement action (as well as the sixty-nine pilots whose names were known to the EEOC, but whom the agency made no further effort to directly contact, and thus to whom the one-page letter was never sent) objected to their exclusion from the terms of the settlement agreement and consent decree. Nevertheless, the court felt the agreement and decree, which specifically dismissed the action as to these heretofore absent class members, did "not prejudice the objectors' rights because they had no rights left to prejudice" (App. A 50) due to the previous statutory termination of the objectors' right to file individual suits that occurred when the enforcement action was initially brought.

This analysis seems facially reasonable enough, but cannot withstand extended scrutiny. It erroneously equates the ADEA's statutory replacement of an individual remedy with a representative one (upon the EEOC's commencement of an enforcement action), on the one hand, and the EEOC's subsequent termination of any ADEA remedy by its conscious decision to exclude the objector pilots from the representative remedy, on the other. The fact that the statute purports to extinguish the individual's right of action cannot be relied on as a basis for deciding the present case if implementation of the statutory process is itself unconstitutional, as it was in this case due to insufficient notice to the excluded pilots.

The logical extension of the court of appeals' analysis that the objectors "had no rights left to prejudice" reveals the severe shortcoming in such an outcome-determinative approach. If the objector pilots have no rights left to prejudice, then neither do any of the pilots the EEOC purported to represent in this suit, including those the agency did include in the settlement agreement and consent decree, because all these pilots lost their rights to pursue an individual remedy once the EEOC commenced the enforcement action. The circuit court admitted as much, without expressly deciding the issue, when it opined:

> It is an interesting question whether the individual employees who benefit from the settlement have standing to challenge the settlement agreement, as they too have no vested rights in the lawsuit. Because none of the amici or other employees who benefited from this settlement have objected, we need not resolve this issue.

(App. A 62, n. 13) (emphasis supplied). Under the court of appeals' approach, presumably the EEOC could have settled the claims of the pilots who were given an opportunity to opt-in, without fear that they could object to the terms of the settlement provisions or to whom the settlement purported to apply. Under the circuit court's analysis, the EEOC is given total and absolute power to settle ADEA enforcement actions, because the employees they purport to represent therein have no rights whatever.

Of course, such judicial indifference to the practical effect the settlement of an employment discrimination suit can have on those not allowed to participate therein has been decried in this Court's decision in Martin v. Wilks, supra, decided last term. In that case, this Court determined that persons not parties to such a consent decree could not subsequently be barred from pursuing damages suffered as a result of that consent decree merely because of some amorphous principle of "impermissible collateral attacks" thereon.

A similar analysis applies to the instant case. Simply because objector pilots such as Petitioner herein, in addition to all the pilots who might have objected had they been sent adequate notice of the EEOC enforcement suit, and those who did opt-in, no longer had a statutory right to pursue an individual ADEA remedy does not mean the entire class of victimized employees the EEOC purports to represent in ADEA enforcement suits may be victimized a second time by the agency's whim and caprice in its conduct of litigation purportedly commenced on their behalf. If the circuit court's view of the scope of the EEOC's discretion were accurate, then the first two settlements the EEOC and Pan Am proposed would not have been rejected.

Although the circuit court's conclusion that the objector pilots (and, by logical extension, all pilots the EEOC purported to represent in its enforcement suit) had no rights to protect is thus exposed as erroneous, the nature and extent of the rights enjoyed by the pilots remains to be resolved. The circuit court itself recognized certain rights with the following language:

> On its face, we find the objectors' claim appealing. It is fundamental to our notions of due process that a consent decree cannot prejudice the rights of a third party who fails to consent to it. See Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986); United States v. Ward Baking Co., 376 U.S. 327, 334-35 (1964). This rule is founded in our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4449 at 417 (1981). "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party ... without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." Firefighters, 478 U.S. at 529. Likewise, a consent decree cannot prejudice the rights of persons who are strangers to the proceeding, even though they may have

> actual knowledge of the settlement or the underlying litigation. Martin v. Wilks, 109 S. Ct. 2180, 2184 (1989).

(App. A 43-46).

This Court's decision last year in Hoffman-La Roche, Inc. v. Sperling, supra made clear the importance of notice in the enforcement of the ADEA. That litigation arose under the provisions of the FLSA that allow employees to bring suits on behalf of themselves "and others similarly situated," 29 U.S.C. § 216(b), as incorporated in the ADEA, in response to a "reduction in force" in which the employer fired or demoted some 1,200 workers. 58 U.S.L.W. at 4073.

A group of Hoffman-La Roche employees affected by the mass firings and demotions brought suit, and then sought discovery from the employer concerning other employees that might consent to be represented. (Id.). The plaintiff group also sought court approval of letters that would be sent to potential class members, while the defendant employer opposed the motions and filed a "cross-motion" asking the court to invalidate notices already sent and send "corrective notice" to the recipients of the prior notices. (Id.). The plaintiffs' motions were granted and the cross-motion denied, and the trial court's rulings were upheld by the Third Circuit Court of Appeals. (Id.).

This Court affirmed, opining that the facts and circumstances of the case illustrated "the propriety, if not the necessity" for court intervention in the notice process applicable to ADEA representative suits brought by employees. (Id.). Such intervention benefits the judicial system by efficiently resolving common issues of law and fact arising from the same alleged discriminatory activity in one proceeding, but these benefits "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether or not to participate." 58 U.S.L.W. at 4074. Thus, this Court stated that a trial court has a "managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." (Id.).

Although it might be posited that the need for such judicial oversight would be lessened when an ADEA representative suit is brought by the EEOC rather than an employee or employee group on behalf of those similarly situated, both the facts and circumstances of the instant case and the procedural distinctions between these two types of ADEA representative suits instead clearly indicate that this is not the case; if anything, the opposite is true, because the EEOC may have less incentive than private litigants to provide extensive notice to potential plaintiffs, and because the individual consequences of a failure to opt-in are much more serious in cases brought by the EEOC than in cases brought by an employee.

Unlike the "private" class representative, who may need to build a litigation "war chest" by contacting other potential parties to the case, the EEOC, once it files an enforcement action, immediately has the full power of the federal government to set against the employer. Thus, in an EEOC enforcement case there may actually be an economic disincentive for the agency to expend funds for the purpose of contacting potential class members, because such persons will not be contributing to litigation costs. Even if the presence of numerous class members could be considered advantageous merely by sheer weight of numbers, the EEOC, unlike a private ADEA representative plaintiff, will not share in any monetary judgment gained by prevailing in the suit [aside from attorney's fees and costs, see, 29 U.S.C. §§ 626(b), 216(b)].

Although the EEOC might be presumed to be more expert or adept at locating potential class members whom it purports to represent in ADEA enforcement actions, than would be private representative plaintiffs, the facts and circumstances of the instant case demonstrate that this is either not true, or that the economic concerns of litigation have begun to outweigh the EEOC's purpose of securing freedom from employment discrimination for all of this nation's workers. The agency has never provided anything vaguely resembling an adequate explanation of why, in the instant case, it made no further effort to provide personal notice to the sixty-nine persons whose names were given to the EEOC by Pan Am.

Instead, the agency principally relied on an informal letter printed in a pilot's newsletter by Ray Egan, see, (App. A at 17-20), a pilot the EEOC did represent in this suit, and news reports in the media (id. at 23-24), to inform of the proceedings these sixty-nine pilots it knew were probably qualified to opt-in (in addition to the unknown number of other employees not disclosed by the Pan Am list). Moreover, the notices that were sent by the EEOC were only posted in the regular United States mails, rather than by some form of registered or certified mail, by which the agency might be able to ascertain how many persons actually received the one-page letter. It will therefore never be known how many of the three hundred and fifty-two employees who failed to respond to the mailed notice were in fact exercising an "informed decision about whether or not to participate" in the suit, and how many were simply the unfortunate victims of imperfections in an overworked postal system.

In short, the EEOC has unfortunately provided this Court with a graphic illustration of its ability to purportedly litigate age discrimination in employment claims on behalf of a representative class without any knowledge whatsoever concerning how many members of the class have received notice of the litigation. The circumstances of this case belie any contention that the EEOC is more competent or concerned than a private representative ADEA plaintiff in terms of providing notice to class members. But perhaps even more important than these facts -- that show that judicial involvement in notice procedure is just as crucial to EEOC enforcement actions as to employee-sponsored representative suits brought to enforce the ADEA -- are the differences between the statutory procedures applicable to each type of ADEA representative suit.

As previously pointed out, an employee must opt-in to either type of representative ADEA suit in order to share in any benefits that might accrue from the litigation. But an employee who fails to opt-in to an ADEA representative suit brought by fellow employees retains his right to sue the employer individually, while employees who fail to opt-in to an ADEA representative suit brought by EEOC lose such right, upon the EEOC's filing suit purportedly on their behalf, and such employees are then left without any remedy whatsoever. Thus, notice in EEOC enforcement suits is even more important than in the similar type of representative suit brought by fellow employees that was the subject of this Court's decision in Hoffman-La Roche v. Sperling, supra. Once an EEOC enforcement action is brought, victims of age discrimination not only lose their right to choose their "champion," as the trial court referred to the ADEA representative plaintiff in Sperling v. Hoffman-La Roche, 118 F.R.D. 392, 403 (D.N.J. 1988), but their right to champion their cause themselves is already lost in favor of the EEOC. Therefore, the "vagaries of rumour and gossip," id.; Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983), produce far more dangerous effects when they are relied upon by the EEOC, as occurred in the instant case, than when a class representative suit is brought to enforce the ADEA by an injured employee.

The practical effect of EEOC enforcement suits under the ADEA is thus to bind absent class members by cutting off their right to sue on their own behalf, even though they are not "bound" by the judgment in the strict sense and therefore they cannot share in any fruits of the EEOC's labors. Thus, the hundreds of employees who may have no notice in any given case which the EEOC deems important enough to warrant bringing an enforcement suit are faced with a "no-win" situation: while their rights to any recovery are being bartered away by the EEOC without their knowledge, the employees' rights to sue on their own behalf are also extinguished.

Of course, the absent employees cannot know their individual rights to sue have "previously" been extinguished without notice, and it is at this point that the court of appeals' reasoning (premised on the observation that absent employees purportedly represented in EEOC enforcement actions "have no rights to lose" once an enforcement action is brought) falls apart. This Court has indicated that absent nonparties may be bound in "certain limited circumstances" via representative suits, and "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants . . ., legal proceedings may terminate preexisting rights if the scheme is consistent with due process." Martin v. Wilks, supra 109 S. Ct. at 2184, n.2 (emphasis supplied).

The circuit court below apparently realized that due process concerns are indeed implicated by EEOC enforcement suits under the ADEA, despite its previous statement that absent class members in such suits have "no rights left to prejudice" (App. A 50), when it later concluded "that the notification procedures adopted by the EEOC were sufficient to satisfy the requirements of due process." (App. A 52-53).

The court of appeals held that the procedures adopted by the EEOC in the instant case met the standard established by this Court in Mullane v. Central Hanover Bank & Trust Co., supra, that notice must be reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. See, (App. A 54). This conclusion was reached despite the fact that the EEOC failed to send any notice to sixty-nine pilots whose names were given to it by Pan Am, and made no effort to determine whether any of the three hundred and fifty-two pilots who did not respond to the one-page missive had ever received it.

Mullane v. Central Hanover Bank & Trust Co., supra, involved the extinguishment of rights in an estate via probate proceedings, and in that case this Court held that notice by publication is a poor and sometimes hopeless substitute for actual service of notice, and that a state statutory scheme permitting notice by publication even to known interested parties was constitutionally deficient, since it could not properly be considered "reasonably calculated" to provide actual notice to such known interested parties. The decision below fails to contain an adequate explanation of how the Mullane standard was satisfied, in light of the EEOC's knowing and intentional failure to ascertain information that might have allowed mailed notice to the sixty-nine employees whose identities were made known to the agency by Pan Am, where the EEOC instead relied on an informal published notice by an individual pilot, along with news reports, to apprise these pilots that their interests would subsequently be represented solely by the EEOC.

The court of appeals' failure to provide a detailed justification of the EEOC's procedures under Mullane is understandable, as the EEOC's conduct in this case is utterly indefensible. At some point EEOC must be subjected to an affirmative duty to use information it has regarding potential class members in an ADEA enforcement suit. In a similar context, state courts have long held that executors and administrators in a position analogous to that of the EEOC in an ADEA enforcement suit have such a duty to heirs of the estate whose probate they are placed in charge of. See, e.g., Succession of Hearn, 412 So.2d 692 (La. Ct. App.), cert. denied, 415 So.2d 215 (La. 1982) (executrix breached duty to decedent's child where former had information from which she knew or should have known there was at least one child of decedent who should take as "forced heir"). Petitioner does not seek to impose any type of tort duty on the EEOC for its gross negligence in the way it may litigate an ADEA enforcement suit such as the present one, but Petitioner does respectfully assert that if the EEOC intentionally takes no steps to notify persons known to it to be potential class members in such suits, its subsequent bartering away of such absent parties' rights is violative of the due process clause of the Constitution.

The contents of the notice used by the EEOC in the instant case were also constitutionally deficient, even if EEOC had sent the notice to all the persons it should have. Not only must notice of a representative suit adequately describe substantive claims being (or to be) litigated, it must also contain information reasonably necessary to make a decision as to class membership. See, In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088 (7th Cir. 1977) (class action pursuant to Fed. R. Civ. P. 23). The notice must contain information a reasonable person would consider material in making an informed, intelligent decision regarding class membership. Id. It has been said that to be sufficient, the notice should not only state where and at what time a party is to proceed, but also describe the consequences of the failure of the person to whom notice is given to act as the law specifies. Schafran & Finkel, Inc. v. M. Lowenstein & Sons, Inc., 280 N.Y. 164, 19 N.E.2d 1005, reh'g denied, 280 N.Y. 687, 21 N.E.2d 196 (1939). The notice sent by the EEOC in the instant case and held by the circuit court to comply with due process did not comport with such requirements, which the Ninth Circuit has previously described as the requirement that notice of representative suits must present a "fair recital" of the suit's subject matter and the proposed terms thereof, see, Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977) (class action pursuant to Fed. R. Civ. P. 23), since it did not provide its recipients with any of the following information: (1) the statutory authority pursuant to which the EEOC was proceeding; (2) the remedies that could or might be sought by the EEOC on behalf of the notice's recipient; and (3) the fact that the EEOC had elected to extinguish the notice's recipients' rights to sue individually by bringing the enforcement action, nor that the EEOC's suit was being brought not only on behalf of pilots it referenced as "already included in the case" (those who had already notified the EEOC of their "interest in" the positions that Pan Am refused to allow to be filled by employees of a certain age), but on behalf of all those similarly situated.

The circuit court's response to the EEOC'S failure to include the above information, which would indisputably be material to an employee's decision to respond to the notice, was again perfunctory. With respect to the failure of the EEOC to state that its suit extinguished the individual right of all employees to sue based on the alleged discrimination described in the letter, the circuit court dismissed the omission as being "of no consequence," opining that:

> Section 7(c) of the ADEA and section 16(b) of the FLSA are not unlike statutes of limitations, barring the filing of any private ADEA lawsuit after the commencement of an EEOC enforcement action. It is well established that due process does not require the government to notify individuals of the existence of such self-executing bars to litigation. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985) ("All citizens are presumptively charged with knowledge of the law."); *Texaco, Inc. v. Short*, 454 U.S. 516, 533-37 (1982). When a rule of law uniformly affects all similarly situated citizens, as does the ADEA's bar to subsequent litigation, an individual need not be given advance potice before the rule may operate. *Texaco*, 454 U.S. at 537. Therefore, it

> was sufficient for the EEOC to inform the objectors that it had commenced litigation on their behalf; it had no constitutional obligation to inform them of the legal consequences of its having done so. That having been said, we note that the EEOC would not be remiss in including this information in future notice to potential claimants.

(App. A 59-60) (footnote omitted).

The cases cited by the circuit court in the above quotation, Atkins v. Parker, 472 U.S. 115 (1985), and Texaco, Inc. v. Short, 454 U.S. 516 (1982), have nothing to do with representative actions which extinguish individual rights to sue. Instead, Atkins concerns notice of a legislative change in the law brought about by statutory amendment, while Short involved a statutory scheme's failure to include specific notice that a mineral right would lapse if not used, and is the origin of the circuit court's analogy to statutes of limitation in the instant case, as quoted above.

Petitioner respectfully asserts that although the analogy to statutes of limitation used by this Court was perfectly appropriate in Texaco, Inc. v. Short, supra, its application to the ADEA's statutory scheme is faulty. The extinguishment of a right to sue caused by the unilateral decision of a federal agency to bring a representative action is simply not "self-executing," certainly at least not in the way that the passage of a statute of limitations is. The court of appeals' direction to the EEOC to include such information in future notifications (suggesting that the agency "would not be remiss" in so doing) indicates that even the opinion's author realized the transparency of relying on Atkins and Short.

This case, like Hoffman-La Roche v. Sperling, supra, concerns notification procedures applicable to class suits whose purpose is to enforce the ADEA, in factual circumstances where literally hundreds of people need to be notified of the pendency of litigation. The narrow question presented in Hoffman-La Roche languished in the lower courts for at least a decade before a sharp conflict of authority was finally resolved by this Court. [The Ninth Circuit Court of Appeals had espoused the anti-notice position rejected in Hoffman-La Roche as early as 1977, see, Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977).] Petitioner respectfully requests that this Court grant the instant petition in order to clarify and ensure the rights of thousands of victims of age discrimination that will be in question for years to come if this important federal issue is not swiftly resolved.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a Writ of Certiorari and review the decision of the Court of Appeals below.

Respectfully submitted,

Kelvin H. Keith

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari has been furnished by regular United States mail, to Donna Brusoski, Esq., counsel for Respondent Equal Employment Opportunity Commission, at 1801 L Street, N.W., Washington, D.C. 20507, to Judith Gold, Esq., of Heller, Ehrman, White and McAuliffe, counsel for Respondent Pan American World Airways, Inc., at 333 Bush Street, San Francisco, California 94104; to counsel for Certain Claimants, Sanford J. Rosen, Esq., and Melanie Carver, Esq., of Rosen & Phillips, 155 Montgomery Street, 8th Floor, San Francisco, California 94104, and James C. Sturdevant, Esq., and Patricia Sturdevant, Esq., of Sturdevant & Sturdevant, P.C., at

120 Montgomery Street, Suite 1800, San Francisco, California 94104-4321, and to counsel for Respondent Morgan D. King, William Bernstein, Esq., of Lief, Cabraser & Heimann, Embarcadero Center West, 275 Battery Street, 30th Floor, San Francisco, California 94111, this 25 day of May, 1990.

Kelvin H. Keith
KELVIN H. KEITH, pro se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

PAN AMERICAN WORLD AIRWAYS, INC.

Defendant-Appellee,

v.

MORGAN D. KING, KELVIN H. KEITH.

Objectors-Appellants,

v.

CERTAIN CLAIMANTS,

Claimants-Appellees.

Nos. 88-15672,
89-15192

D.C. No.
CV-81-3636-RFP

OPINION

Appeal from the
United States District Court
for the Northern District of California
Robert F. Peckham, District Judge,
Presiding

Argued and Submitted
August 15, 1989--San Francisco, California

Filed March 2, 1990

Before: Charles Wiggins and
Alex Kozinski, Circuit Judges,
and Alicemarie H. Stotler,*
District Judge.

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*The Honorable Alicemarie H. Stotler, United States District Judge for the Central District of California, sitting by designation.

Opinion by Judge Kozinski

SUMMARY

Employment Discrimination/Courts and Procedure

Affirming a judgment of the district court, the court held that an Equal Employment Opportunity Commission enforcement action terminates an individual employee's right to bring an Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, suit on his own behalf.

Appellants Morgan King and Kelvin Keith are two former pilots of appellee Pan American World Airways who did not share in the benefits of a consent decree entered in an ADEA action brought by the EEOC against Pan Am. They appealed from a

district court order denying them participation in the settlement and approving the decree. Since 1964, the Federal Aviation Administration has prohibited anyone over the age of 60 from serving as a commercial airline pilot. Until his lawsuit was brought, Pan Am required its pilots to retire at age 60 even though many of them, including King and Keith, wished to continue working in the cockpit as flight engineers, a job with no age maximum. In 1981, the EEOC brought suit charging that Pan Am's forced retirement policy violated § 4(a) of the ADEA and sought relief on behalf of two named pilots and any other persons who would have remained in the Company's employment past the age of 60 in a Flight Engineer position but for the Company's refusal to employ that person after he reached the age of 60. The EEOC then notified all Pan Am former pilots whose names and addresses were given out by the Company of the pending lawsuit, telling them that a prompt response would insure their inclusion in the suit, and that if no response was received, the EEOC would assume they were not interested in continuing employment as a Flight Engineer with Pan Am. Keith's name was given, but King's was not. However, even before the EEOC's mailing, information about the suit was circulating through the retired pilot and flight engineers' newsletter and other sources. Two settlement agreements between Pan Am and the EEOC were disapproved by the district court, and information about them was also widely circulated. Just before closing arguments at the trial, the EEOC and 63 of the named claimants submitted a third proposed settlement agreement and consent decree providing not only the terms, but also the statement that upon final entry, the action is dismissed as to all persons listed in Exhibits A and C and as to any other pilots who would have remained in Pan Am's employment but for Pan Am's age 60 retirement policy. King, Keith, and six other former pilots, not previously involved in the lawsuit, filed motions seeking inclusion in the settlement class. Both King and Keith claimed to have heard about the suit for the first time in February 1988, when they read newspaper accounts of the settlement. The district court rejected the objectors' requests for inclusion and approved the decree.

[1] Objectors King and Keith raised two broad objections to the settlement and consent decree. First, they argued that the decree denies them their day in court by dismissing with prejudice any ADEA claims they may have had against Pan Am, and second, they contended that the court erred in finding the consent decree otherwise fair and reasonable. [2] The statutory structure plainly gives the EEOC the dominant role in enforcing the ADEA. Both § 7(c) of the ADEA and § 16(b) of the Fair Labor Standards Act, 29 U.S.C. §§ 216(c), 217 (1982) expressly foreclose subsequent litigation by or on behalf of an employee following the commencement of an EEOC enforcment action. [3] Contrary to the objectors' contentions, the consent decree does not in fact prejudice any rights they have under the ADEA because an

individual's right to bring a private ADEA action terminates upon the EEOC's commencement of an enforcement action on his behalf. King and Keith's rights to bring any ADEA claims against Pan Am therefore terminated in 1981 when the EEOC filed its complaint on their behalf.

[4] The objectors also challenged as unconstitutional the manner in which the EEOC brought its enforcement action. They contended that due process required the EEOC to inform them not only that the Commission had brought this action, but also that by doing so, it had extinguished their private rights under the ADEA. They contended that had they received this type of notice, they would have informed the EEOC that they wanted to participate in its lawsuit against Pan Am and,

presumably, would have been entitled to share in the settlement. The court rejected this argument, concluding that the notification procedures adopted by the EEOC were sufficient to satisfy the requirements of due process. [5] While King and Keith claimed they did not receive the EEOC's notice, the district court found that Keith had in fact received it, and that both objectors were familiar with the substance of the notice. Actual knowledge of the pendency of an action removes any due process concerns about notice of the litigation. [6] That the notice did not advise King and Keith that they had lost their right to bring private actions under the ADEA is of no consequence. Due process does not require the government to notify individuals of the existence of such self-executing bars to litigation.

COUNSEL

William Bernstein, Mulholland, Bernstein and Peterson, San Rafael, California; Kelvin H. Keith, South Miami, Florida, Pro per, for the objectors-appellants.

Donna J. Brusoski, Equal Employment Opportunity Commission, Washington, D.C., for the plaintiff-appellee.

Judith Z. Gold, Heller, Ehrman, White and McAuliffe, San Francisco, California, for the defendant-appellee.

Sanford Jay Rosen, Rosen and Phillips, San Francisco, California; James C. Sturdevant, Sturdevant and Sturdevant, San Francisco, California, for the claimants-appellees.

OPINION

KOZINSKI, Circuit Judge:

Morgan King and Kelvin Keith are two former Pan American World Airways pilots who did not share in the benefits of a consent decree entered in an ADEA action brought by the Equal Employment Opportunity against Pan Am. They appeal from a district court order denying them participation in the settlement and approving the decree.

I

Since 1964, the Federal Aviation Administration has prohibited anyone over the age of 60 from serving as a commercial airline pilot. See 14 C.F.R. § 121.383(c) (1989). Until this lawsuit was brought, Pan Am required its pilots to retire when they turned 60, even though many of them, including King and Keith, wished to continue working in the cockpit as flight engineers, a job with no age maximum.

The EEOC brought suit in 1981, under sections 16(c) and 17 of the Fair Labor Standards Act, 29 U.S.C. §§ 216(c), 217 (1982), charging that Pan Am's forced retirement policy violated section 4(a) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (1982). The EEOC's complaint sought relief on behalf of two named pilots and "any other persons who would have remained in the Company's employment past the age of 60 in a Flight Engineer position but for the Company's refusal to employ that person after he reached the age of 60." Clerk's Record (CR) 1 at 2.

Shortly after filing the complaint, the EEOC asked Pan Am for a list of former pilots, so that the Commission could notify all pilots who qualified for inclusion in the lawsuit. Pan Am produced a list of 514 pilots but, inexplicably, provided mailing addresses for only 445 of them. King and Keith were both among the 514; Keith was among those whose addresses Pan Am gave to the EEOC, King was not.

On June 9, 1982, the EEOC mailed the following letter to each of the 445:

> Dear Retired Pan Am Pilot or Flight Engineer:

The United States Equal Employment Opportunity Commission is currently suing Pan Am for age discrimination caused by its refusal to permit persons over the age of 60 to hold the position of flight engineer. We are attempting to identify each pilot retired since September 15, 1978 who would have taken a bump-down to flight engineer rather than be forced to terminate his employment at the age of 60. We are also trying to locate each career flight engineer who was forced to terminate his employment in that position at the age of 60 since September 15, 1978. If you fall into either of the above categories and desired to continue your employment with Pan Am past the age of 60 as a flight engineer at the time of retirement, please contact Connie Haydari of this office at the above address or phone number as soon as possible. Your prompt response will ensure that you are included in the EEOC's efforts to gain relief for the victims of Pan Am's refusal to employ flight engineers over the age of 60.

If we do not hear from you, we will assume that you were not interested in continuing your employment as a flight engineer with Pan Am past the age of 60 and will not contact you further. If you have already notified this office of your interest in this position at the time you were retired, you do not need to contact

> us again as you are already included in the case.

Keith Excerpts of Record (ER) 39. Although Keith claims he never received this letter, the district court found to the contrary. EEOC v. Pan American World Airways, Inc., No. C-81-3636 RFP at 28-29 (N.D. Cal. June 17, 1988) (order approving settlement and consent decree) (hereinafter "Order"). King, of course, did not receive the letter because the EEOC did not have his address. On September 1, 1982, the EEOC filed a statement with the district court listing those pilots who were eligible for relief; the list contained the names of 93 pilots who had responded to the mailing.1

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1. This number has varied through the course of the litigation, as pilots have been added or dropped for various reasons. It has not been fixed at 106,

including six who never received the June 9, 1982, letter. See Declaration of Connie Haydari, King's ER at 42.

Even before the EEOC's mailing, information about the suit begun to circulate among pilots. Many Pan Am Pilots knew of the dispute as early as 1978, and it was widely discussed thereafter. In November 1981, the bimonthly newsletter of the Pan Am Clipper Pioneers, an organization of former Pan Am pilots and flight engineers, included a memorandum from retired pilot Ray Egan to all retiring and former Pan Am pilots. Egan was one of the claimants named in the First Amended Complaint filed October 8, 1981. Egan's memo explained:

> The ... lawsuit seeks to enjoin Pan Am from refusing to permit persons between the ages of 60 and 70 to hold the position of Flight Engineer. The original complaint specifically seeks relief on behalf of Frederick P. Vanderhoof and Raymond L. Russell and "any other persons who would have remained in the Company's employment

> past the age of 60 in a Flight Engineer position but for the Company's refusal to employ that person after he reached the age of 60.["]

A FIRST AMENDED COMPLAINT was filed on Oct. 8, 1981 to include [17 additional named claimants] and any other person who would have remained in the Company's employment past the age of 60 in a Flight Engineer position but for the Company's refusal to employ that person after he reached the age of 60.

There is a 3 year statute of limitations which dates back from Sept. 15, 1981, the date the case was originally filed in court. Thus, the only persons discriminated against since 9/15/78 are covered by the suit.

Pilots who were deterred from applying for bump down to flight engineer because they knew of the age 60 rule and consequently did not bid down are covered in the same manner as persons who formally bid for bump down and were rejected by Pan Am.

The EEOC's lawyer, Mr. Fritz Wollett, Equal Opportunity Commission, San Francisco District Office, 1390 Market Street, Suite 1010, San Francisco, CA 94102 states, "Any person who wants to learn more about the suit may contact me (Mr. Wollett) by collect call." Mr. Wollett cites the Western Airlines judgement of a few months ago as a precedent for optimism. In a letter to me dated September 30, 1981 he states, "should we be successful in our efforts potential remedies include back pay, liquidated damages and the opportunity to accept reemployment with Pan Am as a flight engineer."

If you are interested, there is no cost to you other than your own time and effort to provide the information required by the EEOC as soon as possible.

Supplemental Record Excerpts (SRE) 339 (emphasis original).

King and Keith denied having received the newsletter. The district court dismissed as incredible Keith's claim of non-receipt. Order at 28-29. However, the court found that the newsletter addressed to King and to at least one other retired pilot contained typographical errors in the zip codes. Order at 15-16. The court, however, deemed it unnecessary to determine whether King had actually seen Egan's memo because it found that King had notice of the litigation from other sources. Order at 16 n.3.

In May 1983, Pan Am and the EEOC entered into a settlement agreement providing for the rehire of 46 former pilots as flight engineers, and for a back pay award of $250,000 to be divided among 30 other former pilots. The district court disapproved the settlement because the Supreme Court had just granted certiorari in TWA v. Thurston, a case presenting similar issues, and the law was accordingly unsettled. EEOC v. Pan American World Airways, Inc., 34 Fair Empl. Prac. Cas. (BNA) 321, 323 (N.D. Cal. 1984).

After the Supreme Court decided Thurston, 469 U.S. 111 (1985), Pan Am and the EEOC modified the settlement to provide for a recovery of $1.5 million, to be divided among 81 claimants. Forty-five of the claimants objected to the agreement, and the district court rejected the settlement, finding that "[t]he settlement agreement offers claimants inadequate compensation for their years of involuntary retirement." EEOC v. Pan American World Airways, Inc., 622 F. Supp. 633, 648 (N.D. Cal. 1985). Pan Am appealed but we dismissed for want of jurisdiction. EEOC v. Pan American World Airways, Inc., 796 F.2d 314 (9th Cir. 1986) (per curiam), cert. denied, 479 U.S. 1030 (1987).

All this litigation did not pass unnoticed. Ray Egan deposited letters describing the dispute in the company mailboxes of all Pan Am pilots in 1978, 1979 and 1981. Order at 14. Many issues of the Clipper Pioneers newsletter carried information about the suit, and it was discussed at a number of Clipper Pioneer meetings. Declaration of W.R. Chamberlin, SRE at 179-81. Information about the suit was also included in numerous Pan Am annual reports to shareholders. Order at 14. In addition, news of the two disapproved settlements was reported widely in the press. Joint Excerpts of Record at 156-60. Finally, information about recent age discrimination suits against Pan Am and other airlines appeared in at least one issue of the newsletter of the Airline Pilots Association, in a 1986 issue of the American Association of Retired Persons News Bulletin, and in several issues of the magazine Aviation Week and Space Technology. Declaration of Daniel Mulholland, SRE at 190-92.

After Pan Am exhausted its appeals from the order disapproving the second proposed settlement, the district court granted partial summary judgment in favor of the EEOC. EEOC v. Pan American World Airways, Inc., Nos. C-81-3636-RFP, C81-4590-RFP (N.D. Cal. July 31, 1987) (memorandum and order granting partial summary judgment). The court found that the EEOC had established a prima facie case of age discrimination, id. at 9, and held that Pan Am could offer at trial only one of its three proposed affirmative defenses, that its employment policies were based on reasonable factors other than age. Id. at 10-16; see 29 U.S.C. § 623(f)(1) (1982 & Supp. V 1987).

Trial commenced on December 7, 1987. After each side had presented its evidence, just before closing arguments, Pan Am, the EEOC and 63 of the named claimants who had been allowed to participate as amici curiae2 submitted a third proposed settlement agreement and consent decree. The decree provides that Pan Am will pay $17.2 million to a maximum of 106 claimants: the 91 listed in the fifth (and last) amended complaint and 15 named claimants who retired after the fifth amended complaint had been filed. The decree also provides that Pan Am will allow pilots to become flight engineers when they turn 60. In addition, paragraph 17 of the decree states: "Upon final entry of this Settlement Agreement and Consent Decree, this action is hereby dismissed with prejudice in its entirety as to all persons listed in Exhibits A and C and as to any other pilots who would have remained in Pan Am's employment but for Pan Am's refusal prior to February 1, 1988, to employ that person after he reached the age of 60." EEOC v. Pan American World Airways, Inc., No. C-81-3636 RFP (N.D. Cal. Feb. 3, 1988) (settlement agreement and consent decree) (emphasis added).

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2. Fifty-seven of the claimants moved to intervene as plaintiffs, alleging that the EEOC was not adequately representing their interests; the claimants argued that the EEOC was biased in favor of currently employed pilots at the expense of former pilots. The court denied this motion, but permitted these claimants to participate as amici. EEOC v. Pan American World Airways, Inc., No. C-81-3636 RFP (N.D. Cal. Dec. 3, 1987) (memorandum and order denying claimants'

motion to intervene as full-party plaintiffs and granting claimants' motion to participate at trial as amici). Six claimants were apparently added to this group afterwards.

As with other aspects of the case, this agreement received widespread publicity. King, Keith and six other former pilots (the objectors) who had not previously been involved in the lawsuit filed motions seeking inclusion in the settlement class. Both King and Keith claimed to have heard about the suit for the first time in February 1988, when they read newspaper accounts of the settlement. Pan Am, the EEOC and the 106 named claimants all opposed inclusion of the objectors in the settlement. They claimed that enlarging the class of pilots participating in the settlement would disrupt the delicate compromise embodied in the decree by diluting the named claimants' recovery or opening up the possibility that Pan Am's exposure could exceed the agreed-upon $17.2 million.

After holding a lengthy hearing on the fairness of the proposed decree, the district court rejected the objectors' requests for inclusion and approved the decree. The court held that an EEOC enforcement action terminates an individual employee's right to bring an ADEA suit on his own behalf, making the EEOC the sole cognizable plaintiff. Order at 20-21. In addition, the EEOC was not required to bring suit on behalf of any particular grievant or to notify victimized employees of their right to share in an EEOC recovery. Id. at 22-24. According to the court, the EEOC's discretion in conducting ADEA enforcement actions is limited only by the requirements of due process and, therefore, it must notify potential claimants before depriving them of the right to bring or join a lawsuit. Id. at 24. The court concluded, however, that the notice provided by the EEOC was constitutionally adequate, and that the objectors had actual knowledge of the lawsuit long before coming forward in 1988. Id. at 26-30.

King and Keith are the only objectors who appeal. Everyone else -- the EEOC, Pan Am, and the amici claimants -- have lined up in the support of the district court's judgment.

II

Ordinarily, people who were not parties before a district court may not appeal the court's judgment. We nevertheless permit nonparties to appeal where they actually participated in proceedings before the district court and the equities weigh in favor of hearing the appeal. See, SEC v. Wencke, 783 F.2d 829, 834 (9th Cir.), cert. denied sub nom., DeLusignan v. Gould, 479 U.S. 818 (1986); In re Grand Jury Proceedings (Conforte), 643 F.2d 641, 643 (9th Cir. 1981). A nonparty must, of course, also have a personal stake in the outcome of the litigation discernible from the record before it will be allowed to maintain an appeal. Bender v. Williamsport Area School Dist., 475 U.S. 534, 543-44 (1986).

King and Keith meet these requirements. While they are not parties, they raised their claims in the district court and the court considered and denied their requests on the merits. The equities favor our hearing the appeal; it would be a cruel irony to bar an appeal from an order denying permission to participate in litigation for the very reason that the would-be appellants did not participate below. Finally, King's and Keith's interest in the outcome of the litigation is obvious: If they are permitted to participate in the settlement they stand to recover a substantial amount. Moreover, the consent decree approved by the district court purports to bar them from future litigation. Accordingly, we will exercise our discretion to entertain this appeal.

III

[1] Objectors King and Keith raise two broad objections to the settlement and consent decree: First, they argue that the decree denies them their day in court by dismissing with prejudice any ADEA claims they may have had against Pan Am; and second, they contend that the XXcourt erred in finding the consent decree otherwise fair and reasonable. Moreover, objector King also suggests that the district court erred in denying his request to intervene in the EEOC's litigation under Fed. R. Civ. P. 24. We consider these contentions in turn. But, recognizing that it is

impossible to review the district court's judgment without a thorough understanding of the EEOC's role in enforcing the ADEA, we begin our analysis by examining the statutory scheme under which the EEOC brought this action.

A. The Statutory Scheme

Congress enacted the Age Discrimination in Employment Act in 1967 to restrict arbitrary discrimination on account of age. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-634). The ADEA prohibits numerous employment practices including failure to hire, discharge, denial of employment and discrimination with respect to terms or conditions of employment because of an individual's age. See B. Schlei & P.

Grossman, Employment Discrimination Law 485-86 (2d ed. 1983). Because it borrows many provisions from the Fair Labor Standards Act and Title VII, the ADEA is "something of a hybrid, reflecting, on one hand, Congress' desire to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the pre-existing schemes." Lorillard v. Pons, 434 U.S. 575, 578 (1978). Of primary concern to us are the ADEA's enforcement provisions, which are closely patterned after those of the FLSA.

Section 7 of the ADEA, 29 U.S.C. § 626 (1982), details the means by which the substantive provisions of the ADEA may be enforced. Section 7(b), 29 U.S.C. §

626(b), incorporates the remedies and procedures contained in sections 16 and 17 of the FLSA. 29 U.S.C. §§ 216, 217 (1982 & Supp. V 1987). These sections, in turn, contemplate two methods of enforcement; FLSA section 16(b) creates a vehicle, wholly apart from Fed. R. Civ. P. 23, for employees to bring individual or class actions for damages, while the EEOC may bring damages suits under section 16(c). Section 17 empowers district courts to provide injunctive relief. Perhaps in an abundance of caution, Congress also authorized private litigation within the ADEA itself. Section 7(c)(1), 29 U.S.C. § 626(c)(1), provides that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter."

[2] The statutory structure plainly gives the EEOC the dominant role in enforcing the ADEA. Both section 7(c) of the ADEA and section 16(b) of the FLSA expressly foreclosure subsequent litigation by or on behalf of an employee following the commencement of an EEOC enforcement action. Section 7(c)(1) of the ADEA states that "the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter." Section 16(b) of the FLSA contains a similar provision: "The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall

terminate upon the filing of a complaint by the Secretary of Labor3 in an action under section 217 of this Title."4

Likewise, sections 16(b) and (c) foreclose the right of an employee to participate as a party plaintiff in an EEOC enforcement action.

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3. Prior to 1978, both the ADEA and the FLSA authorized suits by the Secretary of Labor rather than the EEOC. In 1978 the Secretary's functions were transferred to the EEOC, and ADEA § 7 was amended to reflect that fact. See Reorganization Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19,807, 92 Stat. 3781 (reprinted in App. 1, Title 5, U.S.C.A.). Although the Reorganization Act was found to be unconstitutional because it contained a legislative veto provision, see EEOC v. Westinghouse Elec. Corp., 765 F.2d 389, 390-91 (3d Cir. 1985), Congress subsequently ratified the transfer of enforcement authority to the EEOC. See Pub. L. No. 98-532, 98 Stat. 2705 (1984). Inexplicably, however, the FLSA continues to refer only to the Secretary of Labor, even though public age discrimination suits brought pursuant to its enforcement provisions are currently carried out by the EEOC.

4. Other courts have found no distinction between the terms "commencement" as used in ADEA § 7(c) and "filing of a complaint" as used in FLSA § 16(b). See, e.g., EEOC v. Gilbarco, Inc., 615 F.2d 985, 988-90 (4th Cir. 1980); see also Oscar Mayer & Co. v. Evans, 441 U.S. 750, 759 (1979) (under ADEA § 14(b), 29 U.S.C. § 633(b), "commencement" means the filing of a complaint). We have no occasion to disagree with these holdings.

Suits brought by the EEOC thus have priority over private suits: Once the EEOC commences an age discrimination suit, the right to commence a private action twice authorized by the ADEA ceases to exist. ADEA private lawsuits therefore are secondary in the statutory scheme to administrative remedies and suits brought by the Commission. See Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978); Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 841 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978).5

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5. The ADEA also contains other limitations on an individual's right to bring an enforcement action. Section 7(d) prohibits employees from commencing a private civil action under the Act until 60 days after filing with the EEOC a charge alleging unlawful discrimination. 29 U.S.C. § 626(d) (1982). During that time,

the Commission must notify all potential defendants and seek to eliminate the alleged unlawful practices through "informal methods of conciliation, conference, and persuasion." Id. Only if the Commission's efforts to rectify the situation fail may an employee commence a private action. See id.; see also Report of the Committee on Labor and Public Welfare, S. Rep. No. 723, 90th Cong., 1st Sess. (1967), reprinted at, 113 Cong. Rec. 31,249, 31,250 (Nov. 6, 1967). Even then, if the EEOC commences an enforcement action before an individual employee does, the right of that individual to bring a private action is abrogated.

The enforcement provisions of the ADEA, including the automatic termination of an employee's private rights upon the commencement of an EEOC action, are an integral part of the ADEA's remedial scheme; their purpose is "to relieve the courts and employers of the burden of litigating a multiplicity of suits based on the same violations of the act by an employer." S. Rep. No. 145, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S. Code Cong. & Ad. News 1620, 1659 (discussing FLSA Section 16(b)). Moreover, these provisions reduce the danger of inconsistent adjudications because the claims of all employees who have not already initiated private actions are consolidated at the time the EEOC files its suit. See Donovan v. University of

Texas at El Paso, 643 F.2d 1201, 1207-08 (5th Cir. 1981). Finally, they preclude res judicata problems because the EEOC judicially binds all employees on whose behalf it sues. Id. at 1208.

Mindful of this complex statutory structure, we proceed to consider King and Keith's objections to the consent decree approved by the district court.

B. The Objectors' Challenges

Objectors King and Keith contend that the settlement is unfair because it extinguishes their rights under the ADEA without providing them any relief. In particular, they point to paragraph 17 of the consent decree, which dismisses with prejudice any rights they might have had to bring private ADEA actions against Pan Am. Objectors argue that the EEOC has denied them due process by settling away their legal rights without proper notice or consent, and without giving them anything in exchange.

On its face, we find the objectors' claim appealing. It is fundamental to our notions of due process that a consent decree cannot prejudice the rights of a third party who fails to consent to it. See Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986); United States v. Ward Baking Co., 376 U.S. 327, 334-35 (1964). This rule is founded in our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449 at 417 (1981). "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party ... without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." Firefighters, 478 U.S. at 529. Likewise, a consent decree cannot prejudice the rights of persons who are strangers to the proceeding, even though they may have actual knowledge of the settlement or the underlying litigation. Martin v. Wilks, 109 S. Ct. 2180, 2184 (1989).

Were this the end of our inquiry, King and Keith would surely prevail in their effort to overturn the district court's order approving the settlement and consent decree. Although they were permitted to intervene for the limited purpose of challenging the consent decree, neither King nor Keith were parties to the settlement; nor did they agree to its terms. The consent decree therefore could not prejudice their rights without offending due process.

[3] Contrary to the objectors' contentions, however, the consent decree does not in fact prejudice any rights they have under the ADEA. As explained earlier, an individual employee's right to bring a private ADEA action terminates upon the EEOC's commencement of an enforcement action on his behalf. See pp. 2362-64 supra. The EEOC sought recovery in this suit on behalf of "any ... persons who would have remained in the Company's employment past the age of 60 in a Flight Engineer position but for the Company's refusal to employ that person after he reached the age of 60." EEOC's Complaint, CR 1 at 2. The objectors do not dispute that they fall within this category of persons; indeed, in order to prevail in an ADEA claim against Pan Am they would have

to prove that they fit precisely the description of persons on whose behalf the EEOC brought its suit. An EEOC age discrimination suit commences with the filing of the complaint, regardless of whether the complaint names specific individual employees. See EEOC v. Gilbarco, Inc., 615 F.2d 985, 990 (4th Cir. 1980).6 King and Keith's rights to bring any ADEA claims against their former employer therefore terminated on September 15, 1981, when the EEOC's filed its complaint on their behalf.

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6. Compare Donovan v. Crisostomo, 689 F.2d 869, 875 (9th Cir. 1982), which held that, for purposes of statute of limitations, an EEOC enforcement action commences when the Commission identifies individual employees by name. However, the result in Donovan was compelled by specific language in FLSA section 16(c) regarding the commencement of an EEOC action for statute of limitations purposes:

> In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

29 U.S.C. § 216(c) (1982). There is no analogous statutory language regarding the ADEA's antiduplicative suit provisions. Thus, for purposes of extinguishing a claimant's private ADEA rights, the EEOC need only specify with reasonable certainty on the face of the complaint that its action has been filed on behalf of that employee. This is precisely what the EEOC did here. We read Congress's careful choice of language as requiring the EEOC to do nothing more to foreclose subsequent private litigation.

By its plain language, paragraph 17 of the consent decree merely confirms the effect of the Commission's action, barring King, Keith and similarly situated individuals from bringing their own private ADEA actions against Pan Am.[7] Because the EEOC's lawsuit already barred such suits, paragraph 17 is mere surplusage; it does not prejudice the objectors' rights because they had no rights left to prejudice.[8]

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[7] Some courts have held that the EEOC'S commencement of an ADEA enforcement action does not affect those private suits already commenced. See EEOC v. Chrysler Corp., 759 F.2d 1523, 1525 (11th Cir. 1985); EEOC v. Eastern Airlines, Inc., 736 F.2d 635, 639-41 (11th Cir. 1984); Donovan v. University of Texas at El Paso, 643 F.2d 1201, 1207 (5th Cir. 1981); but see Jones v. City of Janesville, 488 F. Supp. 795, 797 (W.D. Wis. 1980). However, nothing in the record indicates that any former Pan Am pilots, including King or Keith, had brought private ADEA actions

against Pan Am prior to the EEOC's commencement of this action.

8. Had paragraph 17 barred all claims against Pan Am, including those arising under state law, our analysis would be very different. The EEOC has no power to extinguish state claims or state statutory rights. Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044, 1049 n.7 (2d Cir. 1982). The matter is different when the right is one created entirely by the ADEA itself. See note 14 infra.

[4] The objectors, however, also appear to challenge as unconstitutional the manner in which the EEOC brought its enforcement action. They content that due process required the EEOC to inform them not only that the Commission had brought this action, but also that, by doing so, it had extinguished their private rights under the ADEA. While their arguments are not entirely clear, the objectors apparently contend that, had they received this type of notice, they would have informed the EEOC that they wanted to participate in its lawsuit against Pan Am and, presumably, would have been entitled to share in the settlement. We reject this argument, concluding that the notification procedures adopted by the EEOC were

sufficient to satisfy the requirements of due process.9

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9. In order for governmental action to raise due process concerns, the action must affect individual life, liberty or property interests. See Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972). The objectors contend the EEOC's enforcement action and resulting settlement decree deprived them of a cognizable property right in the form of private ADEA actions against Pan Am. The district court found that, although the ADEA's three-year statute of limitations period had passed, 29 U.S.C. § 255(a), 626(e) (1982), the objectors might have been able to bring their own ADEA suit under the doctrine of equitable tolling, but for the fact that EEOC's commencement of this action had extinguished their rights. Order at 26. The district court held that, even if equitable tolling did apply, the procedures employed by the EEOC did not deny them due process. We assume, without deciding, that the objectors were entitled to invoke equitable tolling and therefore, but for the EEOC's action, would have residual rights under the ADEA.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), established that state action affecting individual property rights generally must be accompanied by notification of that action: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at 314. Notice must be such that "one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Id. The purpose of notice, therefore, is to enable individuals to know of governmental actions affecting their rights so that they may act to protect those rights.

[5] Here, we find no due process violation in the EEOC's decision to select beneficiaries in the settlement on the basis of responses to the notice it sent out.10 The notice certainly disclosed to potential claimants the existence of the lawsuit and advised them that failure to contact the EEOC could lead to exclusion from any recovery resulting from the Commission's efforts. While King and Keith claim that they did not receive the EEOC'S notice, the district court found that Keith had in fact received it, and that both objectors were familiar with the substance of the notice. Actual knowledge of the pendency of an action removes any due process concerns about notice of the

litigation. See Farwest Steel Corp. v. Barge Sea-Span 241, 769 F.2d 620, 623 (9th Cir. 1985); Lehner v. United States, 685 F.2d 1187, 1190-91 (9th Cir. 1982), cert. denied, 460 U.S. 1039 (1983).11

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10. We recognize that the Fifth Circuit has held that due process does not require the Secretary of Labor (now the EEOC) to provide notice to employees on whose behalf it sues under section 17(c) of the FLSA. Donovan v. University of Texas at El Paso, 643 F.2d 1201 (5th Cir. 1981). Donovan recognized that employees are powerless to request, consent, compromise or otherwise affect pending enforcement actions, because their substantive rights are extinguished as soon as the government files suit. Id. at 1208. Moreover, employees have no right to opt into or out of a public enforcement action. Id. at 1207-08. In fact, the Fifth Circuit noted, Congress actually has deleted a provision from the FLSA requiring the government to obtain an employee's consent before suing for backpay on his behalf. Id. at 1205-06. See 29 U.S.C. § 216(c) (1964) (amended Pub. L. No. 93-259 § 26, 88 Stat. 61, 73 (1974). See also EEOC v. Chrsyler Corp., 546 F. Supp. 54, 73-75 (E.D. Mich. 1982), aff'd, 733 F.2d 1183 (6th Cir. 1984). Thus, Donovan concluded, "no purpose -- neither fundamental [fairness] nor due process requirements

... -- would be served by notification procedures like those found in Rule 23." Id. at 1208. Since the EEOC did provide notice in this case, we need not decide whether the Donovan rule applies in this circuit.

11. The objectors' reliance on General Telephone Co. v. EEOC, 446 U.S. 318 (1980), for the proposition that the EEOC may not bind parties without their consent is inapposite. In General Telephone, the Supreme Court held it was "unconvinced" that the EEOC would bind all employees on whose behalf it brings suit under section 706(a) of Title VII of the Civil Rights Act of 1964. 446 at 333. However, this is not a Title VII action, and the enforcement provisions of the ADEA are not analogous to those of Title VII. While Title VII encourages private suits, sections 7(c)(1) of the ADEA and 16(b) of the FLSA explicitly preclude such actions subsequent to the EEOC's commencement of an enforcement action. Title VII has no analogous provision.

Objector King's reliance on Partlow v. Jewish Orphans' Home of Southern California, 645 F.2d 757 (9th Cir. 1981), is equally misplaced. Partlow was not an EEOC action at all, it was a private opt-in type class action for unpaid overtime wages under FLSA section 16(b). The court held that an FSLA class member who is not notified of and does not consent to a private action brought on his behalf is not bound by an adverse judgment and is not barred from filing an individual claim. Id. at 759. While Partlow would have helped the objectors had this been a private opt-in lawsuit, it is inapposite to suits brought by the EEOC. The language in ADEA section 7(c)(1) and FLSA section 16(b) bars only those private suits brought after an EEOC action. The commencement of a private opt-in type class action, as in Partlow, does not extinguish the right of another aggrieved employee to bring a subsequent private action unless that employee has affirmatively opted into the litigation. See Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977).

[6] That the notice did not advise King and Keith that they had lost their right to bring private actions under the ADEA is of no consequence. Section 7(c) of the ADEA and section 16(b) of the FLSA are not unlike statutes of limitations, barring the filing of any private ADEA lawsuit after the commencement of an EEOC enforcement action. It is well established that due process does not require the government to notify individuals of the existence of such self-executing bars to litigation. See Atkins v. Parker, 472 U.S. 115, 130 (1985) ("All citizens are presumptively charged with knowledge of the law."); Texaco, Inc. v. Short, 454 U.S. 516, 533-37 (1982). When a rule of law uniformly affects all similarly situated citizens, as does the ADEA's bar

to subsequent litigation, an individual need not be given advance notice before the rule may operate. Texaco, 454 U.S. at 537. Therefore, it was sufficient for the EEOC to inform the objectors that it had commenced litigation on their behalf; it had no constitutional obligation to inform them of the legal consequences of its having done so. That having been said, we note that the EEOC would not be remiss in including this information in future notice to potential claimants.12

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[12] Of course, no notice, even in the form requested by the objectors, would have enabled the King and Keith to protect their rights to bring private ADEA actions against Pan Am. The objectors' rights to sue Pan Am terminated automatically upon the EEOC's filing of its complaint; nothing they could have said or done after that point would have revived these rights. Whatever due process may require, it certainly does not require a futile act.

King and Keith also challenge the settlement on the merits. Specifically, they take issue with the fact that, while cutting off their rights, the settlement agreement provides them no benefits at all. This argument, however, is foreclosed by our discussion above. The objectors had not right to participate in the EEOC's lawsuit because they expressed their interest too late in the day. The objectors therefore have no standing to challenge the terms of the settlement agreement. Whether we approve the settlement or disapprove it, it will do the objectors absolutely no good. Because all parties to the settlement agreement -- the EEOC, Pan Am, and the amicus claimants -- are satisfied with the settlement, we see no basis for reviewing it on the merits.13

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[13] It is an interesting question whether the individual employees who benefit from the settlement have standing to challenge the settlement agreement, as they too have no vested rights in the lawsuit. Because none of the amici or other employees who benefited from this settlement have objected, we need not resolve this issue.

C. Denial of King's Motion to Intervene

Objector King contends that the district court erred in denying his motion to intervene as a full party plaintiff, rather than merely for the limited purpose of challenging the settlement agreement. Under Fed. R. Civ. P. 24(a), a court must permit a nonparty to intervene in an action when a statute confers an unconditional right to intervene, or "the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." Neither of these standards is met here.

The ADEA and the FLSA do not grant King an unconditional right to intervene. See Mitchell v. McCorstin, 728 F.2d 1422, 1423 (11th Cir. 1984). In fact, sections 16(b) and (c) specifically preclude an employee from becoming a party plaintiff in the EEOC enforcement action. Nor does King have an interest in the litigation to protect. As explained previously, King's rights under the ADEA terminated upon the commencement of the EEOC's action. See pp. 2362-64 supra. Thus, King has no interest with which to support his intervention as a party plaintiff under Rule 24(a). See Donovan v. University of Texas at El Paso, 643 F.2d at 1208 ("in § 17 suits, intervention by party plaintiffs is not allowed, mandating instead that the Secretary be the sole party plaintiff");

see also EEOC v. Chrysler Corp., 50 Empl. Prac. Dec. (CCH) ¶ 39,149 at 58,295, 58,296-97, 49 Fair Empl. Prac. Cas. (BNA) 1439, 1440 (E.D. Mich. 1989), EEOC v. Boeing Co., 109 F.R.D. 6, 9-10 (W.D. Wash. 1985); EEOC v. Consolidated Edison of N.Y., 557 F. Supp. 468, 472 (S.D.N.Y. 1983).

King's request for permissive intervention under Fed. R. Civ. P. 24(b) likewise fails. A party seeking permissive intervention must demonstrate a basis for federal jurisdiction independent of the court's jurisdiction over the underlying action. EEOC v. Nevada Resort Ass'n, 792 F.2d 882, 886 (9th Cir. 1986); Blake v. Pallan, 554 F.2d 947, 955-56 (9th Cir. 1977). Because the EEOC's commencement of its enforcement action terminated any rights King may have had against Pan Am, King can claim no substantive rights over which the district court would have had jurisdiction. See Chrysler, 50 Empl. Prac. Dec. (CCH) ¶ 39,149 at 58,297, 49 Fair Empl. Prac. Cas. (BNA) at 1441; Boeing, 109 F.R.D. at 10. Without a jurisdictional basis, there can be no intervention under Rule 24(b).

Conclusion

We affirm the judgment of the district court in its entirety.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	No. C-81-3636 RFP No. C-81-4590 RFP

Plaintiff,

v.

PAN AMERICAN WORLD
AIRWAYS, INC. et al.,

Defendants.

AND RELATED CROSS AND THIRD PARTY ACTIONS.	ORDER APPROVING SETTLEMENT AND CONSENT DECREE

INTRODUCTION

The Equal Employment Opportunity Commission ("EEOC"), Pan American World Airways ("Pan Am") and counsel for certain former pilot-claimants ("Claimants") submitted on February 3, 1988 a settlement agreement and proposed consent decree in this action ("Proposed Decree"). The court has received several objections to the

Proposed Decree. Individual Claimant Thuel Schuhart asks that the court rule on the tax status of monetary benefits distributed to Claimants. In addition, former Pan Am pilots who have not joined Claimants and thus will not share in the settlement (hereafter "Objector Pilots") request that the Proposed Decree be modified to include them. These Objector Pilots fall into two groups: (1) those who claim they received no notice of the suit until the public announcement of the settlement agreement; and (2) those Pan Am pilots who retired outside of the time period selected by the EEOC to determine eligibility to join in this lawsuit.

BACKGROUND

The EEOC filed this action against Pan Am on September 15, 1981, alleging that Pan Am's policy towards its age-60 pilots who wished to continue flying past age 60 as flight engineers discriminated on the basis of age, in violation of the Age Discrimination in Employment Act ("ADEA"). The EEOC sought back pay, liquidated damages and injunctive and declaratory relief.

This case was originally scheduled for trial in April, 1983. On the eve of trial, the EEOC and Pan Am entered into a proposed consent decree which provided for reinstatement of all Pan Am pilot-claimants who wished to return to work as flight engineers. The proposed decree also provided for payment of $250,000. Following a fairness hearing in September, 1983 Judge Ingram of this court disapproved the decree. EEOC v. Pan American Worlds Airways, Inc., 34 F.E.P. ¶

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321 (N.D. Cal. 1984). The EEOC and Pan Am proposed another consent decree, this time providing payment of $1.5 million, plus reinstatement. Numerous objections were filed, a fairness hearing was held, and the court once again disapproved the proposed decree, largely on the ground that the amount of compensation was inadequate in view of potential liability in excess of $50 million. *EEOC v. Pan American World Airways, Inc.*, 622 F. Supp. 633 (N.D. Cal. 1985) (Peckham, C.J.), *appeal dismissed*, 796 F.2d 314 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 874 (1987).

The case finally returned to this court, with trial scheduled for November, 1987. On June 31, 1987, we granted partial summary judgment for the EEOC, finding that a prima facie case of age discrimination had been established against Pan Am. The court further held that Pan Am was limited at trial to two Reasonable Factor Other Than Age defenses: (1) whether its discriminatory practices were required by its collective bargaining agreements, and (2) whether its discriminatory practices were justified by its safety concerns. Court assisted settlement negotiations commenced shortly thereafter.

A jury trial commenced on December 8, 1987. After both sides rested, and just prior to closing arguments to the jury, Pan Am, the EEOC and 63 claimants (out of 91 listed as parties to the action) on February 3, 1988 submitted to the court the settlement agreement and proposed consent decree presently at issue.

This settlement agreement provides for the payment of $17.2 million over a period of 2.5 years to no more than the 106 Claimants specifically listed in Exhibits A and C to the settlement agreement. The agreement sets forth the methodology for distribution of monetary benefits to these identified Claimants. The agreement further provides that each of the identified Claimants and all current and future Pan Am pilots have the right to continue flying as flight engineers beyond age 60.

Claimants entitled to share in the settlement proceeds include 91 identified Pan Am pilots who formally opted into the action. The Applicants also agreed to include within the monetary terms of the settlement all Pan Am pilots who retired between April 1, 1987 and January 31, 1988 and who made efforts to become flight engineers upon retirement. This latter group, referred to as "Appendix C" pilots, was included because their names and addresses had not been previously provided to the EEOC and thus they had received no notification of the suit. The Appendix C pilots' names and addresses had not been provided to the EEOC earlier because they had only just retired and become eligible to participate in the settlement. Under the distribution methodology set forth elsewhere in the settlement, Appendix C Claimants would receive less than 1% of the overall award. The settlement is thus minimally diluted by the participation of Appendix C Claimants.

On February 3, 1988 the Applicants executed a side letter providing the EEOC with additional time to investigate its records to determine whether any charges or complaints arising out of the subject matter of this action had been filed by persons other than Claimants. The letter set forth a dispute resolution process to determine the status of such a "charging party" if one were found to exist. Counsel for Claimants only agreed to this procedure because it assumed there were no charging parties. Rosen Declaration at ¶ 20. In fact, the EEOC's search revealed that there were no charging parties other than those already listed as Claimants in this action.

DISCUSSION

1. Standard of Review

"The sole question before a district court in reviewing a settlement is whether the agreement is fundamentally fair or just." *Moore v. City of San Jose*, 615 F.2d 1265, 1271 (9th Cir. 1980). In reviewing a proposed consent decree, the court should not attempt to resolve underlying factual or legal disputes. *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). Nor should the court judge the proposed decree "against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Id*. (emphasis in original).

The court is mindful that voluntary settlements of employment discrimination cases are looked upon with favor. *See Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1214, *reh'g denied*, 581 F.2d 267 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Officers for Justice v. Civil Service Comm'n*, 473 F. Supp. 801, 803 (N.D. Cal. 1979), aff'd, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). Moreover, it is significant that the EEOC, a governmental agency charged with pursuing the public interest, is a party to this settlement. Williams v. City of New Orleans, 729 F.2d 1554, 1559 (5th Cir. 1984); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977). Nevertheless, the court must still carefully examine the proposed decree to make sure that it is "fundamentally fair, adequate and reasonable" under the circumstances. Officers for Justice, supra, 688 F.2d at 625. See also United States v. City of Alexandria, 614 F.2d 1358, 1362 (5th Cir. 1980) (court will not approve Title VII consent decree between government and private party if decree is unreasonable, illegal, unconstitutional or

against public policy). The rights and interests of each affected party warrant consideration. Pettway, supra, 576 F.2d at 1214.

Finally, although a consent decree is something more than a mere contract, see Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983) ("[j]udicial approval of a settlement agreement places the power and prestige of the court behind the compromise struck by the parties"); EEOC v. Pan American, supra, 622 F. Supp. 641 ("a consent decree, unlike an extrajudicial settlement, bears the imprimatur of the court"), the court is not free to impose on the parties a settlement to which they have not agreed. Cheyenne River Sioux Tribe v. United States, 806 F.2d 1046, 1051 (Fed. Cir. 1986), cert. denied, 107 S. Ct. 3184 (1987). The court cannot modify the terms of a settlement proposal, but can only accept or reject the proposal as presented to it. In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1125 n.24 (7th Cir. 1979); Pettway, supra, 576 F.2d at 1172; Wattleton v. Ladish Co., 89 F.R.D. 677, 680 (E.D. Wis. 1981); Armstrong v. Board of School Directors of City of Milwaukee, 471 F. Supp. 800, 804 (E.D. Wis. 1979), aff'd, 616 F.2d 305 (7th Cir. 1980).

2. Characterization of Settlement Proceeds for Tax Purposes

Thuel V. Schuhart, one of the 106 claimants in this action, objects to the manner in which the Proposed Decree characterizes the money to be paid to the claimants. If the payment is intended to compensate the former pilots for personal injuries, then it is not taxable. See

I.R.C. § 1.104-1(c). If the payment compensates the recipient for lost wages, it _is_ taxable, creating in Pan Am the duty to withhold the taxable amount. Schuhart requests that the court order the parties to modify the Proposed Decree's language to make clear that these damages sound in tort, not contract, thus increasing the likelihood that proceeds will be nontaxable.

The Proposed Decree leaves open the taxability of the proceeds. It does provide, however, that distributions are "subject to any applicable withholding." Proposed Decree at 10:18-19. _See also_ Proposed Decree at 7:14-15 and 8:28-9:2. Schuhart argues that, because the IRS looks to the parties' own characterization of the settlement for purposes of determining tax status, the several references to withholding will undermine any subsequent argument to the IRS that the proceeds should not be taxable. He therefore urges the court to order that references to withholding be stricken and that language be included indicating that the settlement is based on tort-type rights.

Schuhart distorts the import of the decree's several references to withholding. The Proposed Decree is entirely neutral on the question of taxation. Withholding is only required "as appropriate." Proposed Decree at 9:1. According to Applicants, the tax consequences of the settlement were deliberately left open, to be independently resolved by each claimant with the IRS. The references to withholding simply permit Pan Am to comply with its obligations under the law. They do not impinge on the Claimants' right to later seek a refund from the IRS for funds wrongfully withheld.

The Proposed Decree is tax-neutral. A question remains, however: should it be? Put another way, should the court order that language be included that characterizes the settlement as a tort-type remedy, making it more likely that the IRS will regard the distributions as tax-free? Schuhart advances a credible argument that settlement proceeds should not be taxed. This action sought damages for violations of the ADEA, not for breach of contract. Although back pay would have provided one means of measuring the amount of damages due, it would not have provided the sole measure. And even if lost wages served as a primary basis for calculating damages, any recovery would have served to recompense claimants for violation of a personal right: the right not to be discriminated against on the basis of age.

Schuhart stumbles over a preliminary issue, however. The court is unconvinced that the tax issue should even be addressed in this forum. In effect, Schuhart asks the court to rule on the taxability of the settlement. Such a ruling could be subject to appeal, which could hold up distribution of the settlement for some time. Perhaps more importantly, the parties to the Proposed Decree do not take on Schuhart's argument on the merits, and the IRS has not filed any papers in this case. We are thus ill-equipped to pass on the tax issue. This issue may very well provide fertile ground for debate. But not here, and not now. The matter is best left for the claimants and the IRS to resolve in a later action for a refund. Finally, the court is not at liberty to modify the Proposed Decree. See supra. The Applicants make clear that the agreed upon tax language was integral to the settlement. Unilaterally changing that language is beyond the court's power. We therefore reject Schuhart's suggested modification to the Proposed Decree.

Schuhart also moves for an order awarding attorney fees. In view of the disposition of his motion, this request is denied.

3. Objections of Non-Claimant Pan Am Pilots

Eight former Pan Am pilots who purport to qualify as Claimants (hereafter referred to as "Objector Pilots") object to the proposed decree and ask that they be permitted to share in the settlement. One former Pan Am pilot (William Thomas) does not qualify as a potential Claimant under the criteria developed by the EEOC, but argues that he should; his situation is discussed separately below.

a. Objector Pilots

The proposed decree does not include the Objector Pilots as Claimants even though they all served as Pan Am pilots, were forced to retire at age 60 and (at least with respect to some of the Objector Pilots) were denied the opportunity to transfer to flight engineer thereafter. They argue that they should be entitled to share in the settlement proceeds. Barring such participation, they object to the settlement as unfair.

The relevant facts may be summarized as follows: The EEOC in September, 1981 filed this action against Pan Am, alleging that Pan Am's policies with respect to pilots who reached age 60 violated the ADEA. In June, 1982 the EEOC, using a list of former pilots furnished by Pan Am in the course of discovery, sent via first class mail a letter to over 500 retired Pan Am pilots and flight engineers informing them of the EEOC's lawsuit. This letter described the practices the EEOC felt were discriminatory, advised recipients that it was suing Pan Am over these practices, and invited them to call or write the San Francisco office of the EEOC if they qualified for and wished to participate in the lawsuit. The letter further stated: "If we do not hear from you, we will assume that you were not interested in continuing your employment as a flight engineer past the age of 60 and will not contact you further."[1] If the EEOC did not hear from a given pilot and that letter was not returned by the Post Office, the EEOC did not follow up on the matter.

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[1] The EEOC's letter provided in full:

Dear Retired Pan Am Pilot or Flight Engineer:

The United States Equal Employment Opportunity Commission is currently suing Pan Am for age discrimination caused by its refusal to permit persons over the age of 60 to hold the position of flight engineer. We are attempting to identify each pilot retired since September 15, 1978 who would have taken a bump-down to flight engineer rather than be forced to terminate his employment with Pan Am at the age of 60. We are also trying to locate each career flight engineer who was forced to terminate his employment in that position at the age of 60 since September 15, 1978. If you fall into either of the above categories and desired to continue your employment with Pan Am past the age of 60 as a flight engineer at the time of retirement, please contact Connie Haydari of this office at the above address or phone number as soon as possible. Your prompt response will ensure that you are included in the EEOC's efforts to gain relief for the victims of Pan Am's refusal to employ flight engineers over the age of 60.

If we do not hear from you, we will assume that you were not interested in continuing your employment as a flight engineer with Pan Am past the age of 60 and will not contact you further. If you have already notified this office of your interest in this position at the time you retired, you do not need to conact us again as you are already included in the case.

Sincerely,
FRITZ WOLLETT
Trial Attorney

None of the Objector Pilots responded to the letter from the EEOC, nor did the post office return their letters to the EEOC as undeliverable. Their individual stories are variations on a common theme:

(1) Kelvin H. Keith satisfied all the criteria to join the lawsuit as a Claimant. Because Keith's correct name and address appear on the mailing list provided by Pan Am, the EEOC asserts that it mailed him a copy of its June, 1982 letter. Keith did not respond, nor was the letter returned to the EEOC as undeliverable. The EEOC made no further attempts to contact him. Keith claims never to have received or seen the letter. He states that he first heard of the lawsuit in February, 1988 when the settlement was publicized in the national media.

(2) Curtis Gilbert: same circumstances as Keith. In addition, the EEOC has in its files a copy of an envelope from its June, 1982 mailing bearing Gilbert's correct name and address.

(3) Lawrence Vanderberg: same circumstances as Gilbert.

(4) Paul Metcalf: same circumstances as Keith. The EEOC's mailing list contains a typographical error under Metcalf's zip code. Metcalf admits that he had peripheral knowledge of this suit, but that he did not know until February, 1988 that it affected his rights. The Applicants assert that Metcalf was intimately familiar with this lawsuit. Indeed, Metcalf served from 1979 to 1981 as chair of the Master Executive Council of the Air Line Pilots' Association ("ALPA"), the highest ranking ALPA officer

at Pan Am. He testified at System Board proceedings initiated by Claimant Raymond Russell as a precursor to this case. Metcalf also authored a letter to Claimant Ray Egan (trial exhibit P-100), stating that Pan Am's collective bargaining agreements with its unions did not restrict Pan Am pilots from flying as flight engineers because of age. Finally, Metcalf spoke with Pan Am's lawyers about the possibility of his testifying at trial. Metcalf Declaration at ¶ 3. In view of the above, Metcalf's claim that he did not know that the lawsuit involved his rights strains credulity.

(5) Des Fairbain: same circumstances as Keith. As with Metcalf, there was a typographical error in Fairbain's zip code on the mailing list used by the EEOC.

(6) John A. Disbrow: same circumstances as Gilbert. In addition, the list provided the EEOC by Pan Am misspelled his name as "J. Dishrom", and so the EEOC's copy of the envelope from its 1982 letter shows that the letter was sent out under an incorrect name. The correct address was used, however.

(7) Morgan D. King: the list provided the EEOC by Pan Am, which the EEOC used in mailing out its 1982 letter, included King's name, but not his address. Apparently, King was never sent a letter. Wollett Declaration at 2. The EEOC notes that six other former pilots who were never sent letters nevertheless heard of the lawsuit, opted in and are now Claimants. King claims to have first learned of the case in February, 1988. David Kelley of the EEOC challenges this;

he declares that King contacted him on February 17, 1988 regarding the settlement and admitted that he had known of the suit for some time. Kelley Declaration at ¶¶ 4-5.

(8) Fay Brandis: same circumstances as Gilbert, except that he has not filed an affidavit stating that he did not know of the litigation.

The Applicants challenge the Objector Pilots' assertion that they had no notice of the settlement. The Applicants claim that knowledge of this and other ADEA cases was widespread in the airline industry, backing up this claim with a host of affidavits to that effect. These affidavits show that a discussion of the lawsuit was included in numerous Pan Am annual reports to shareholders. In addition, Claimant Ray Egan deposited letters (either personally or through a coworker) describing this dispute in the company mailboxes of all Pan Am pilots in 1978, 1979 and again in 1981. The lawsuit was widely discussed among Pan Am pilots. Egan Declaration at 2. Perhaps most importantly, a newsletter containing a memorandum discussing this lawsuit was was widely distributed via first class mail to former Pan Am pilots in November, 1981. Sturdevant Declaration at ¶ 4. The memorandum, written by Claimant Egan, was directed to "Retired and Retiring Pan Am Pilots". It described in some detail the progress of the litigation to that date and invited interested pilots to contact EEOC attorney Fritz Wollett.[2] The Applicants have submitted a copy of the mailing list used in connection with this newsletter; it shows that a newsletter was sent to the correct name and address of each of the Objector Pilots with the exceptions of Metcalf and King, whose zip codes contained typographical errors. Exhibit B to Sturdevant Declaration.

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[2] Captain Egan's memorandum provided in pertinent part:

October 20, 1981

To: Retiring and Retired PAA Pilots
(Since 9-15-1978)
From: Ray J. Egan, PAA Pilot - Retired - Jan. 1979
Re: The United States Government's Equal Opportunity Commission (EEOC) lawsuit against Pan American World Airways, Inc. on Sept. 15, 1981 in federal district court in San Francisco.

The above lawsuit seeks to enjoin Pan Am from refusing to permit persons between the ages of 60 and 70 to hold the position of Flight Engineer. The original complaint seeks relief on behalf of Frederick P. Vanderhoof and Raymond L. Russell and "any other persons who would have remained in the Company's employment past the age of 60 in a Flight Engineer postion but for the Company's refusal to employ that person after he reached the age of 60.["]

. . .

The EEOC's lawyer, Mr. Fritz Wollett, . . . states, "Any person who wants to learn more about the suit may contact me (Mr. Wollett) by collect call." . . . In a letter to me dated September 30, 1981 he states, "should we be successful in our efforts potential remedies include back pay, liquidated damages and the opportunity to accept reemployment with Pan Am as a flight engineer."

If you are interested, there is no cost to you other than your own time

> and effort to provide the information required by the EEOC as soon as possible.
>
> Sincerely yours,
> Ray J. Egan

(emphasis in original).

These affidavits are offset by those submitted by the Objector Pilots, who state that they never received the June, 1982 letter. At least with respect to Fairbain and Disbrow, this is a credible claim, for the EEOC admits that there were problems with their names or addresses.[3] Fairbain and Disbrow were both mailed the November 1981 newsletter using their correct names and address, however.

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[3] Although the letters to Metcalf and King were also misaddressed or not sent at all, their claims of ignorance are not credible in light of their admitted knowledge of the case. See supra.

The Objector Pilots assert that the only thing that distinguishes them from the 106 Claimants who will share in the settlement is the fact that they never received notice of the lawsuit. They argue that the Proposed Decree is fundamentally unfair unless it includes them as Claimants. Several suggest that they will withdraw their objections if the decree is modified to include them.

The Applicants vehemently oppose the inclusion of any additional pilots, stating that such inclusion will disrupt the delicate compromise struck between the parties. The Proposed Decree is the product of agonizing negotiations. During these negotiations, the Claimants insisted that the universe of those entitled to participate in the settlement be clearly defined. Only then would Claimants be able

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to calculate the individual share going to each Claimant. Their acquiescence was conditioned on those calculations. Inclusion of additional pilots would dilute those shares and disrupt the Claimants' bargain.

By the same token, Pan Am insisted that the settlement set forth the full extent of its liability. As a condition to its willingness to settle the case, Pan Am demanded that its exposure be limited to $17.2 million, no more. Accordingly, Paragraph 17 of the proposed decree provides:

> 17. Upon final entry of this Settlement Agreement and Consent Decree, this action is hereby dismissed with prejudice in its entirety as to all persons listed in Exhibits A and C and as to any other pilots who would have remained in Pan Am's employment but for Pan Am's refusal prior to February 1, 1988 to employ that person after he reached the age of 60. . . .

(emphasis added). Thus, all claims are to be dismissed with prejudice. What is more, the proposed decree purports to bar all potential claims by similarly situated Pan Am pilots -- including those of the Objector Pilots.

Pan Am and the Claimants are not the only signatories to the Proposed Decree, however; the EEOC joins them in commending the settlement to the court. Accordingly, adequate consideration of this dispute requires an understanding of the EEOC's role in ADEA civil actions. Under the ADEA's statutory scheme, individuals may bring suit on their own behalf or for "other employees similarly situated" for "employment, reinstatement, promotion and amounts owing due to violations of the Act, and liquidated damages." FLSA §

16(b), 29 U.S.C. § 216(b) (as incorporated by 29 U.S.C. § 626). Other aggrieved employees must affirmatively opt into such a suit in order to participate. Id., 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."); LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975) ("FLSA § 16(b) allows as class members only those who 'opt in'."). In the context of a class representative action under section 16(b) of the FLSA, 29 U.S.C. § 216(b), the Ninth Circuit has held that district courts do not have the discretion to permit rule 23-type notice to potential claimants. Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977). Potential claimants thus have no right to receive notice of a 16(b) lawsuit, even where they would clearly qualify as such. Under section 16(b), "[n]o member of the class is either bound by the class action adjudication or barred from filing an individual claim . . . unless he opts to become a party." Id. at 862. This contrasts with a Rule 23 class action, in which a member of the class once certified generally is a party to the action unless he affirmatively "opts out." The res judicata effect of an FLSA action under § 216(b) "extends only to the named parties [citation omitted], while in a 'true' Rule 23 class action, the res judicata effect of a judgment extends to the entire class." Id. Reasoning that the omission of a rule 23-type notice provision signified a congressional wish that no such notice be allowed, id. at 863, the court held that plaintiffs could not issue notice to similarly situated employees. The court concluded:

> [I]n any action in which persons who do not affirmatively opt in will not be bound by the outcome, notice is not compelled by due process because the employees' right to litigate will not be compromised merely by their absence from the class proceedings.

Id. at 864. See also Pan American World Airways, Inc. v. U.S. District Court for Central District of Calif., 523 F.2d 1073, 1077 (9th Cir. 1975); Mahoney v. Crocker Nat'l Bank, 571 F. Supp. 287, 295 (N.D. Cal. 1983).

Numerous courts have parted company with the Ninth Circuit and held that district courts do possess the inherent discretion to permit notice to putative class members in 16(b) actions. See, e.g., Woods v. New York Life Ins. Co., 686 F.2d

578, 579-80 (7th Cir. 1982); Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1978); Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983); Johnson v. American Airlines, Inc., 531 F. Supp. 957, 960-61 (N.D. Tex. 1982) (flight engineers entitled to notice of 16(b) action because otherwise ability to opt into action would be left to chance); Monroe v. United Air Lines, Inc., 90 F.R.D. 638, 639-40 (N.D. Ill. 1981). Indeed, the Ninth Circuit itself backed away somewhat from Kinney Shoe in Partlow v. Jewish Orphans' Home of So. Calif., Inc., 645 F.2d 757 (9th Cir. 1981), in which the court permitted notice in a 16(b) class action because the prospective plaintiffs had already received improper notice from plaintiff's counsel and had filed ineffective consent to suit. Id. at 759.

In all of these cases, the courts agreed that due process did not require that notice be provided putative class members because the outcome of the extant 16(b) action would have no effect on the rights of non-parties. Instead, the debate focused on whether courts possessed the discretion to authorize notice in appropriate circumstances. Here, the court faces an entirely different problem. Paragraph 17 of the Proposed Decree would snuff out the rights of non-parties, including the Pilot Objectors. In the context of a 16(b) action, the Ninth Circuit has stated:

> So long as the persons sought to be notified do not become parties to these actions, they will not be bound by the outcome. Hence they will not be adversely affected by these

> actions and need not be notified of them. . . . When no interest is threatened, no notice is required.

Pan American World Airways v. U.S. District Court for Central District of Calif., 523 F.2d 1073, 1077 (9th Cir. 1975). The obvious converse to this is that where an interest is threatened, notice is required.

This action was not brought under section 16(b), however. Instead, this is an enforcement action brought by the EEOC under sections 16(c) and 17, 29 U.S.C. §§ 216(c), 217. An individual employee's right to bring suit on his own behalf or to join as a party plaintiff under section 16(b) terminates upon the commencement of an action by the EEOC "to enforce the rights of such employee." ADEA § 7(c)(1), 29 U.S.C. § 626(c)(1). See Dunlop v. Pan American World Airways, Inc., 672 F.2d

1044, 1049 n.6 (2d Cir. 1982) ("the mere filing of the Secretary's complaint necessarily extinguishes the rights of the employees to bring individual litigation under the ADEA"); EEOC v. Consolidated Edison Co. of New York, 557 F. Supp. 468, 472 (S.D.N.Y. 1983); EEOC v. Chrysler Corp., 546 F. Supp. 54, 60-61, clarified, 546 F. Supp. 73 (E.D. Mich. 1982), aff'd, 733 F.2d 1183, petition for reh'g denied, 738 F.2d 167 (6th Cir. 1984). In establishing both a private right of action and an EEOC enforcement capability, the ADEA creates the problem of potentially duplicative litigation. Congress solved this problem by providing the EEOC with primary ADEA enforcement responsibility, rendering private lawsuits secondary. See Reich v. Dow Badische Co., 575 F.2d 363, 368 (2d Cir.), cert. denied, 439 U.S. 1006 (1978);

Dean v. American Security Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977); Consolidated Edison, supra, 557 F. Supp. at 473. Thus, by commencing this suit, "the EEOC pursuant to ADEA § 7(c)(1) became the sole cognizable plaintiff with regard to the claims it sought to vindicate. . . . The EEOC has been statutorily, and thus conclusively, determined to be an adequate representative of those whose rights it seeks vindication." Id. at 474. See also EEOC v. Boeing Co., 109 F.R.D. 6, 10 (W.D. Wash. 1985) (denying individual pilots' motion to intervene under Federal Rule of Civil Procedure 24(a) because "disposition of this lawsuit [could not] impair the pilots legal interest because they have none. Their rights to bring private suits have terminated.") (footnoted omitted); EEOC v. Eastern Air Lines, Inc., 97 F.R.D.

646, 652-53 (S.D. Fla. 1983) (individual charging parties denied leave to intervene to contest a proposed consent decree between the EEOC and defendant because the EEOC's representation was adequate in light of the overall fairness of the decree). In sum, the EEOC has the statutory authority to file an enforcement action and thereby extinguish the right of aggrieved employees to file individual claims under section 16(b).[4]

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[4] A majority of courts hold that the filing of an EEOC enforcement action does not extinguish previously filed individual suits. See, e.g., Castle v. Sangamo Weston, Inc., 744 F.2d 1464 (11th Cir. 1984); Burns v. Equitable Life Ins. Soc'y, 696 F.2d 21 (2d Cir. 1982), cert. denied, 464 U.S. 933 (1983). This is not such a case, however: to date, none of the Objector Pilots have filed charges with the EEOC, much less lawsuits under section 16(b).

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In filing this complaint, the EEOC sought relief on behalf of all similarly situated Pan Am pilots. The EEOC's authority to bring enforcement actions on behalf of all potential claimants derives wholly from the ADEA and in no way depends upon Federal Rule of Civil Procedure 23. _See_ _Naton v. Bank of Cal._, 649 F.2d 691, 693 (9th Cir. 1981); _cf_. _General Telephone Co. v. EEOC_, 446 U.S. 318, 324 (1980) (action under § 706(f)(1) of Title VII, 42 U.S.C. § 2000e(f)(1)); _Donovan v. University of Texas at El Paso_, 643 F.2d 1201, 1208 (5th Cir. 1981) (FLSA enforcement action). As the Supreme Court stated in _General Telephone_ in the context of a Title VII action, "the EEOC's enforcement suits should not be considered representative actions subject to Rule 23. Although the EEOC can secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.' 118 Cong. Rec. 4941 (1972)." Id. at 326.

If the EEOC recovers damages in connection with an enforcement action, those damages are distributed to the victims of discrimination on whose behalf the EEOC filed suit. 29 U.S.C. § 626(b); see also Larson, 3A Employment Discrimination § 102.32 (Bender, 1987). Back pay awards in the context of EEOC enforcement actions are primarily prophylactic; securing relief for aggrieved individual employees are secondary. Cf. EEOC v. Occidental Life Ins. Co. of Cal., 535 F.2d

533, 537-40 (9th Cir. 1976) (Title VII). Nothing in the ADEA (or, via incorporation, the FLSA) requires the EEOC to bring an enforcement action on behalf of a particular grievant or to provide notice to victimized employees of their right to share in the damages. See 29 U.S.C. §§ 216(c), 626(b); 29 C.F.R. § 1626.15; cf. United States v. Allegheny Ludlum Indus., Inc., 517 F.2d 826, 868 (5th Cir. 1975) ("no individual has a 'right' to prosecution of his or her case by the EEOC [under Title VII] upon any given occasion"). Similarly, nothing in the ADEA explicitly provides for intervention by private parties in an enforcement action by the EEOC. See EEOC v. Pan American World Airways, Inc., 622 F. Supp. 633, 641 (N.D. Cal. 1985), appeal dismissed, 796 F.2d 314 (9th Cir. 1986), cert. denied, 107 S.Ct.

874 (1987); EEOC v. Boeing Co., 109 F.R.D. 6, 10 (W.D. Wash. 1985).

Taken together, these provisions show that the EEOC has broad discretion in conducting enforcement actions. It can extinguish private individuals' causes of action, shape the nature of the relief sought and administer the distribution of any settlement or award. It cannot be compelled to sue on behalf of an individual, nor must it permit individuals to intervene. Its representation is presumptively adequate. As one court has stated, "[b]ecause the ADEA 'creates a remedy for an injury not compensable at common law', Jaeger v. American Cyanamid Co., 442 F. Supp. 1270, 1272 (E.D. Wis. 1978), the procedural conditions that are inextricably interwoven in, and limit the availability of, the rights granted therein are generally permissible, and must be tolerated as 'the bitter with the sweet', Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974)." EEOC v. Consolidated Edison Co. of New York, Inc., 557 F. Supp. 468, 474 (S.D.N.Y. 1983). In this regard, "[n]o distinction need be drawn between the EEOC's claim stating and claim settling functions, both of which are invested with a large dose of discretion." EEOC v. Eastern Air Lines, Inc., 97 F.R.D. 646, 950-51 (S.D. Fla. 1983).

As broad as it is, the EEOC's discretion in conduting ADEA enforcement actions is bounded by the constitutional requirement of due process. Those who rights are prejudiced by the outcome of the litigation are entitled to constitutionally sufficient notice and an opportunity to respond. We thus consider whether the Proposed Decree prejudices the Objector Pilots and, if so, whether they received constitutionally sufficient notice of the opportunity to participate. The Applicants argue that the Objector Pilots are not prejudiced by the Proposed Decree because their rights have almost certainly lapsed in any event. The statute of limitations for ADEA actions is two years from the date when the cause of action accrued. Where the violation is willful, the statute of limitations is three years. 29 U.S.C. §§ 255(a), 626(e). The Objector Pilots' claims accrued on the date that the adverse employment decision was communicated to them, Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (per curiam), or at least six years ago. The EEOC brought this action under sections 16(c) and 17 of the FLSA, as incorporated into the ADEA. Section 16(c) provides that a claimant's action is not commenced for statute of limitations purposes until the EEOC names him or her as a party plaintiff in the complaint. 29 U.S.C. § 216(c), Because the EEOC did not name them as claimants before the statute ran, the individual objectors cannot now be added as claimants. Donovan v. Crisostomo, 689 F.2d 869, 873-75 (9th Cir. 1982). By contrast, under Section 17, the EEOC has the authority to seek back wages (but not liquidated damages) without speecifically naming employees in the complaint. Id. at 875 & n.12; Donovan v. University of Texas at El Paso, 643 F.2d 1201 (5th Cir. 1981); EEOC v. Gilbarco, Inc., 615 U.S. 985, 990 (4th Cir. 1980). The EEOC could seek back pay on behalf of the Objector Pilots, even though they have yet to be named. As we have already noted, however, the EEOC has the discretion to refrain from doing so. The Objector Pilots thus have no constitutionally protectable interest in being afforded the opportunity to join in a section 17 action.

The question remains whether the Proposed Decree deprives the Objector Pilots of an otherwise viable right to bring an individual action under section 16(b). At first blush, any right to bring such an action appears to have long since lapsed. The possibility remains, however, that the statute of limitations may be subject to some equitable tolling doctrine. None are asserted here, however, and we decline to speculate. The Proposed Decree does prejudice the Objector Pilots in that it purports to deprive them of the right to argue in a subsequent action under section 16(b) that the statute of limitations ought to be tolled. The EEOC can bind the Objector Pilots in this manner, but only if they were provided the notice to which they are constitutionally entitled. We thus turn to whether the Objector Pilots received adequate notice of this lawsuit.

The Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), set forth the basic standard for evaluating the sufficiency of notice:

> An elementary and fundamental requirement of due process in any proceedings which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford

> them an opportunity to present their objections. . .
>
> . . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id. at 314-15. As noted above, this is not a class action arising under Federal Rule of Civil Procedure 23. We nevertheless look to Rule 23 cases focusing on the provision of notice, for Rule 23 was intended to incorporate the constitutional requirements set forth in Mullane. Fed.R.Civ.P. Advisory Committee Notes to 1966 Amendment; Zimmer Paper Products, Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985).

Notice is required in class actions because, as a general rule, the judgment will bind all members of the class. Kemp v. Birmingham News Co., 608 F.2d 1049, 1054 (5th Cir. 1979). Rule 23 establishes varying notice requirments, depending on the nature of the class action involved. Rule 23(d)(2) governs notice during the pendency of the action, leaving the precise contours of the notice to the discretion of the district court. Rule 23(e) requires notice of a settlement and of a claimant's right to share in it; here, too, the form of the notice is left to the district court's discretion. Finally, Rule 23(c)(2) sets forth more stringent notice requirements applicable in Rule 23(b)(3) "opt-out" class actions so that potential claimants may know of their right to exclude themselves from the class and avoid the judgment's binding effects.

First class mail and publication are routinely regarded as sufficient to satisfy the notice requirements of rules 23(d)(2) and 23(e), Zimmer Paper Products, 758 F.2d at 90; Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 962-64 (3d Cir. 1983); In re Gypsum Antitrust Cases, 565 F.2d 1123, 1125-27 and n.5 (9th Cir. 1977), and the even more stringent requirments of Rule 23(c)2). Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-75 (1974); Zimmer Paper Products, 758 F.2d at 91; Steiner v. Equimark Corp., 96 F.R.D. 603, 614 (W.D. Pa. 1983).

Here, notice by first class mail was provided by means of the November, 1981 newsletter and the June, 1982 letter from the EEOC. The only Objector Pilots who can credibly claim they were not sent notice -- Metcalf and King -- knew of the lawsuit by other means. See Kemp v. Birmingham News Co., 608 F.2d at 1054 (claimant bound by class action judgment partly because he had actual knowledge of previous lawsuit). Although the notice in this case was not approved by the court, it adequately informed its recipients of their need to opt into the settlement.[5] The notice was not formally published, but under the circumstances of this case, where each of the Objector Pilots was sent personal notice or otherwise knew of the lawsuit, publication was not necessary.

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[5] See supra notes 1-2 and accompanying text.

The Objector Pilots simply deny ever receiving either the newsletter or the EEOC letter. However, a letter properly address, stamped and mailed is presumed to have been received by the addressee. Hagner v. United States, 285 U.S. 427, 430 (1932); Wells Fargo Business Credit v. Ben Kozloff, Inc., 695 F.2d 940, reh'g denied, 699 F.2d 1163 (5th Cir.), cert. denied, 104 S. Ct. 77 (1983); McPartlin v. Commissioner, 653 F.2d 1185, 1191 (7th Cir. 1981); cf. Kim v. Commandant, Defense Language Institute, Foreign Language Center, 772 F.2d 521, 524 (9th Cir. 1985) (service by mail complete upon mailing). In Perdue Farms, Inc. v. Motts, Inc. of Miss., 495 F. Supp. 7 (N.D. Miss. 1978), the court held that an affidavit stating that an envelope was addressed to another at its usual mailing address, that postage for the envelope was prepaid, that its return address was printed on the envelope and that the envelope had not been returned set forth sufficient facts to trigger the presumption that the letter arrived at the proper address. Id. at 18 (citing McKormick's Handbook of the Law of Evidence § 343 at 807-08 (2d ed. E. Cleary, ed. 1972)). The EEOC has supplied affidavits sufficient to give rise to the presumption. See Wollett Declaration ¶ 3; Haydari Declaration ¶ 3; Sturdevant Declaration ¶ 4. The Objector Pilots seek to rebut this presumption by simply declaring that they did not receive the letter. Such self-serving declarations of non-receipt generally do not suffice to rebut the presumption of receipt. See, e.g., Federal Deposit Ins. Corp. v. Schaffer, 731 F.2d 1134, 1137-38 (4th Cir.

1984) (certified mail); Solberg v. Secretary of Health & Human Serv., 583 F. Supp. 1095, 1098 (E.D. Wis. 1984); Gulf Coast Investment Corp. v. Secretary of Housing & Urban Development, 509 F. Supp. 1321, 1329 (E.D. La. 1980); United States v. Freeman, 402 F. Supp. 1080, 1082 (E.D. Wis. 1975). But see In re Yoder Co., 758 F.2d 1114, 1118 (6th Cir. 1985) (declaration of nonreceipt sufficient to rebut presumption). Among the Objector Pilots, only Metcalf and King effectively rebut the presumption of receipt of the June, 1982 letter. Of these, Metcalf and King knew of the lawsuit through other means. See supra.

In McCubbrey v. Boise Cascade Home & Land Corp., 71 F.R.D. 62 (N.D. Cal. 1976), this court considered an effort by putative class members to avoide the res judicata effect of a prior class action judgment. The putative class members argued that they should not be bound because they had never actually received the notice mailed first-class to them. We rejected this argument, holding that "a class adjudication may not be upset on the grounds of nonreceipt of notice." Id. at 74; see also Hallman v. Pennsylvania Life Ins. Co., 536 F. Supp. 745, 747-49 (N.D. Ala. 1982) (suggesting that it is the giving, not the receiving, of notice that is required by Rule 23 and the constitution). In essence, those are the grounds asserted here. We therefore conclude that these objections are without merit.[6]

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[6] We also note that, in light of the presumption of receipt and the amount of time that has passed since the newsletter

and letter were mailed, the Objector Pilots' declarations of non-receipt carry little weight.

b. William Thomas

William Thomas, a retired Pan Am pilot, claims that he qualifies as a Claimant and should thus be included among those entitled to monetary and injunctive relief. Thomas turned 60 on August 15, 1978. Prior to that date, he bid for a flight engineer position, which Pan Am denied. According to Pan Am policy during that time, his official retirement date was the last day of the month in which he turned 60, or August 31, 1978. He last worked for Pan Am as a pilot during that month. On September 8, 1978, Pan Am required that Thomas appear at its base office for a physical examination and other final "check-out" procedures. He received his last paycheck from Pan Am on September 30, 1978 for work performed prior to August 31, 1978.

When the EEOC initiated this lawsuit on September 15, 1981, it determined that those pilots officially retired by Pan Am on or after September 15, 1978 were entitled to participate. The EEOC arrived at this date by applying the ADEA's three-year statute of limitations for willful violations. Under Pan Am policy, those pilots officially retired on September 30, 1978 were eligible for inclusion in the class. Thomas knew of and made several efforts to join this lawsuit. Based upon its calculation of the applicable statute of limitations, however, the EEOC continually rebuffed him.

The statute of limitations for the ADEA is tolled during conciliation efforts by the EEOC. 29 U.S.C. § 626(e)(2). Here, the EEOC sent Pan Am a "Letter of Violation" on April 28, 1981. See Durbin

Declaration ¶ 3; Exhibit A. On May 11, 1981 the EEOC contacted Pan Am attorney Gregory Buhler, who stated that Pan Am rejected any conciliation efforts and would litigate the matter. Id. On or about June 11, 1981, Pan Am sent to the EEOC a letter outlining its position. On or about June 16, the EEOC sent a letter to Pan Am stating that conciliation efforts on the charge had ended. The EEOC maintains that conciliation efforts ceased on May 11, tolling the statute of limitations for 13 days. Accordingly, only those Pan Am pilots retired on or after September 2, 1978 are eligible for relief. Thomas argues that the conciliation period ended on June 16, when the EEOC formally confirming that conciliation was closed. If this were true, the statute would be tolled for 49 days, and Thomas would be included among those entitled to relief. Thus, the court is presented with what is essentially an issue of fact: when did the conciliation period end? We conclude that it ended on May 11. Notes taken by Alex Durbin of the EEOC, who spoke with Buhler on that date, show that Pan Am unequivocally stated that it rejected any efforts to conciliate. Exhibit B to Durbin Declaration. Subsequent letters merely confirmed what was already an accomplished fact. The EEOC regarded the conciliation period as closed on that date, and their position is borne out by the record.

Thomas also argues that he did not actually separate from Pan Am until September 8, 1978, the date of his final examination and "check-out." ADEA claims ordinarily accrue when the claimant receives notice of his or her pending termination, and not on the actual date of termination. Heiar v. Crawford County, 746 F.2d 1190, 1194 (7th Cir. 1981); cf. Delaware State College v. Ricks, 449 U.S. 250 (1980) (same rule in context of Title VII). Where the violation is continuing, as it arguably is here, the cause of action accrues on the last day of actual employment. EEOC v. Home Ins. Co., 553 F. Supp. 704, 713 (S.D.N.Y. 1982). Thomas' "official" retirement date was August 31, 1978, and he ceased to serve Pan Am as a pilot on that date. He provides no factual or legal basis for disregarding this date. We therefore reject Thomas' objection.

4. Fairness of Proposed Decree Generally

Having dispensed with the arguments of each of the objectors, we consider the fairness of the Proposed Decree with respect to Claimants generally. Despite the many months devoted to this dispute, the outcome remains veiled with uncertainty. Pan Am preserved for appeal a number of pretrial rulings, including the denial of a summary judgment motion that would have removed five Berlin-based pilots from the list of Claimants. In addition, even if the jury returned a verdict favorable to the EEOC, it might well have found for Pan Am on the willfulness issue, cutting off any right to liquidated damages, triggering the two-year statute of limitations and excluding numerous Claimants from the class entitled to relief. The court also recognizes that expedient settlement served the Claimants' interests because: (1) reinstatement is only meaningful if it is implemented in the near future, as many of the Claimants are nearing the age when

ADEA protection will be withdrawn and they will be forced to retire; and (2) Pan Am's financial condition and future prospects are uncertain, increasing the risk of delaying any monetary recovery. The proposed monetary relief of $17.2 million greatly exceeds the amount presented to the court in 1985.

Finally, it is significant that the EEOC participated in and approved of the settlement. The fact that a government agency took part in the settlement negotiations is an important factor in weighing the overall fairness of the settlement. See Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977); see also Securities & Exchange Comm'n v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984) ("the courts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment"). Accordingly, we approve the Proposed Decree and settlement.

IT IS SO ORDERED.

Dated: June 17, 1988

/s/
Chief United States District Judge

7600 Red Road, Suite 127
South Miami, FL 33143

December 28, 1989

Ms. Cathy A. Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
Seventh and Mission Streets
San Francisco, California 94103

RE: Keith and King vs. Pan American World Airways and Related Third Party Claimants
No. 88-15672 No. 89-15192
(Consolidated)

Dear Mrs. Catterson:

This case was argued before Judges Wiggins, Kozinski and Stotler on August 15, 1989.

Pursuant to Federal Rules of Appellate Procedure Rule 28(J) appellant Kelvin H. Keith brings to the Courts attention the recent decision handed down in the case of

Hoffmann-La Roche Inc., Petitioner vs. Richard Sperling et al. (58 LW 4072) on writ of Certiorari to the United States Court of Appeals for the Third Circuit No. 88-1203 Argued October 2, 1989 - Decided December 1, 1989.

> "District courts have discretion, in appropriate cases, to implement Sec 216(b), as incorporated by Sec. 626(b), in ADEA actions by facilitating notice to potential plaintiffs."

The fundamental issue in Appellant Keith's appeal is one of fairness which must be adhered to by all parties to any law suit.

During oral argument I stated that the Notice process in an ADEA case should be formulated by a triad composed of the Plaintiff, the Defendant, and the Court.

In Hoffman-La Roche (58 LW 4072) the Court stated at page 4072(b):

> Once an ADEA suit is filed, a district court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient way and has the discretion to begin its involvement at the point of the initial notice rather than at a later time.

In the referenced case the EEOC assumed the sole responsibility of the notice process, including mailings to the selected potential claimants. In Hoffmann-La Roche (58 LW 4072) the Court stated at page 4072:

> Court-authorized notice may counter the potential for misuse of the class device, avoids a multiplicity of duplicative suits, and sets reasonable cut-off dates to expedite the action's disposition.

The EEOC failed to publish Legal Notice by publication in order to satisfy due process requirements.

In Hoffmann-La Roche (58 LW 4072) the Court stated on page 4074:

> Observing that class actions serve important goals but also present opportunities for abuse, we noted that "(b)ecause of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and the parties." 452 U.S., at 100. The same justifications apply in the context of an ADEA action. Although the collective form of action is designed to serve the important function of preventing age discrimination, the potential for misuse of the class device, as by misleading communications, may be countered by court-authorized notice.
>
> By approving the form of notice sent, the trial court could be assured that its cut-off date was reasonable, rather than having set a cut-off date based on a series of unauthorized communications or even gossip that might have been misleading.

Notice must present a fair recital of the suits subject-matter and the proposed terms thereof, that their ability to bring suit on their own behalf terminates upon the start of an action by the EEOC (29 USC 216c). Notice must adequately describe the substantive claims and contain information reasonably necessary to make an informed decision as to class membership.

In Hoffmann-La Roche (58 LW 4072) the Court stated at page 4074:

> A trial court can better manage a major ADEA action if it ascertains the contours of the action at the outset. The court is not limited to passive waiting for objections about the manner in which the consents were obtained. By monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative. Both the parties and the court benefit from settling disputes about the content of the notice before it is distributed.

I would submit to the court that the resolution of the notice issue is of great concern to all ADEA plaintiffs since there is so much confusion on this issue due to the split in the Circuits. It appears to me that the Supreme Court in the case of Hoffmann-La Roche Inc. Petitioner vs. Richard Sperling et al. (58 LW 4072) has brought this issue into proper focus. Page 4074.

> Because trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute, it lies within the discretion of a district court to begin its involvement early, at the point of the initial notice, rather than at some later time.

Thank you for your kind attention to this latest decision.

Sincerely yours,

/s/

Kelvin H. Keith, PRO SE

cc: William Bernstein
Donna Brusoski, EEOC
Ida O. Abbott
Stanford Jay Rosen
James C. Sturdevant